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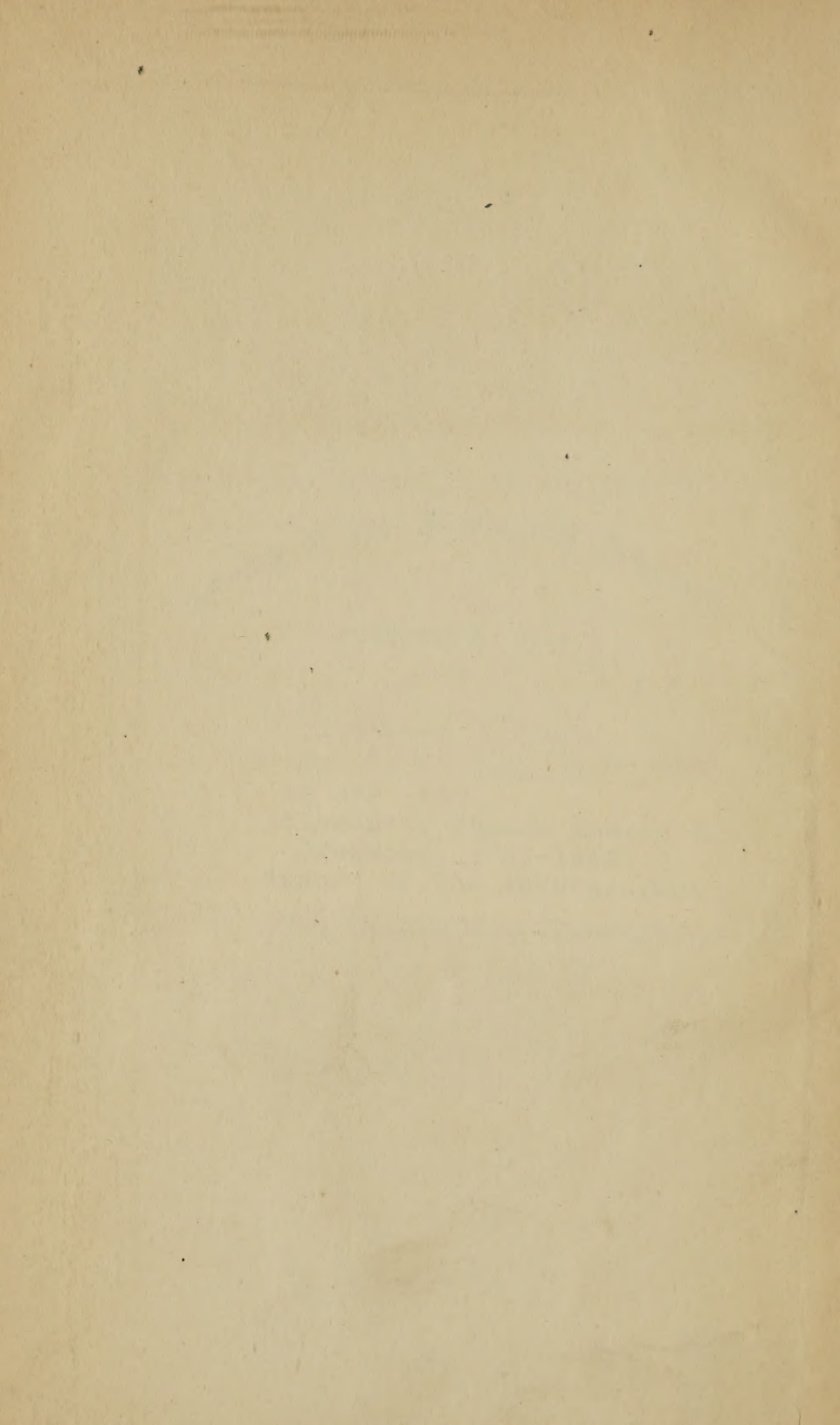
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Report of the Auchterarder
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R E P O R T
OF THE
AUCHTERARDER CASE,

THE EARL OF KINNOULL, AND THE REV. R. YOUNG,

AGAINST

THE PRESBYTERY OF AUCHTERARDER.

By CHARLES ROBERTSON, Esq.,
ADVOCATE,

ONE OF THE COLLECTORS OF DECISIONS, BY APPOINTMENT OF THE
FACULTY OF ADVOCATES.

VOL. II.

PUBLISHED BY AUTHORITY OF THE COURT.

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M.DCCC.XXXVIII.

REPORT

OF THE

ALCOHOLIC CASES

THE CASE OF KENNEDY AND THE REV. A. YOUNG

ADVOCATE

THE UNIVERSITY OF ABERDEEN

BY CHARLES ROBERTSON, M.A.

ADVOCATE

AND OF THE UNIVERSITY OF ABERDEEN, AT ABERDEEN, IN THE

UNIVERSITY OF ABERDEEN

VOL. II.

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REPORT

OF THE CASE

THE EARL OF KINNOULL, &c., *against* THE PRESBYTERY
OF AUCHTERARDER, &c.

OPINIONS OF THE JUDGES.

AFTER the Pleadings in this Cause were closed, the following Opinions were delivered by the Court on Tuesday the 27th of February 1838, and the six subsequent days.

THE LORD PRESIDENT.—MY LORDS,—In arranging the reasons for the opinion which I am now to deliver to your Lordships, I have endeavoured to condense them as much as possible, having regard always to the necessary perspicuity. I have omitted many topics, which, in the course of studying this important cause, presented themselves to my mind, being quite certain that such matters as I have either omitted, or but slightly noticed, will be fully and more ably touched on, by such of your Lordships as may agree with me in opinion. And with the further view of saving your Lordships' time, I shall not enter into any analysis of the different decisions which have been quoted to us, but shall confine myself to a general reference to that class of cases, which go to support the views which I take of the jurisdiction of this Court in cases such as this, where the proceedings of the Church Courts appear to trench on the law of the land, and the patrimonial rights of patrons and presentees. By this means, I hope to compress my opinion within a reasonable compass.

This is a Declarator, with petititory conclusions, brought by Lord Kinnoull, as patron of the kirk and parish of Auchterarder, and Mr Young, a licentiate of the Church, presentee to that parish, to have certain *patrimonial* rights of theirs respectively declared by this Court.

I shall hereafter consider more particularly the specific conclusions of the Summons. At present, the case before us involves the question, whether an act of the General Assembly of the Church, under which the presbytery acted, and by which the pursuers allege that their *civil* and *patrimonial* rights have been invaded and injured, be or be not within the powers of the General Assembly, as constituted by law, or as *ultra vires* of the Assembly, whether considered in reference to the law of the Church or the law of the State.

This question, as I mentioned formerly, is not new to me. I had occasion, some years ago, when I had the honour to be a member of the General Assembly, to consider, with great care and attention, the powers of the Church in its relation to the State. The question then was different, but it led me to the very same research and inquiry which are necessary to enable me to form an opinion on the present case.

I have again most carefully studied the subject, and considered all the arguments on both sides, as given most ably in the printed cases, and, if possible, more ably and fully in the eloquent arguments of the counsel on both sides at our Bar. And the result of my opinion is, that the Act of the General Assembly in 1834, now before us, is *illegal, and not more contrary to the statute law of the land than it is to the law of the Church itself*.

In their arguments at the Bar, the counsel on both sides made admissions, which do not, however, aid us much in determining this question.

The pursuers admitted, that this Court has no power to review or control the proceedings of Church courts, in matters purely *ecclesiastical* and *spiritual*, unless those proceedings encroach on the *patrimonial* or *civil rights* of the parties before them.

The defenders, on the other hand, admitted that the Church of Scotland is subject to, and dependent on, the Legislature.

But these admissions do not solve the question in this case.

For it remains to consider, on the one hand, whether the proceedings of the presbytery, acting under the act of Assembly 1834, do or do not trench on the *civil* and *patrimonial* rights of the patron and his presentee.

And, on the other, *quomodo et ad quem effectum* is the Church subject to the Legislature.

Now, with reference to the Parliament of Scotland, it is material to note, that, at all times, both *Roman Catholic* and *Protes-*

tant, the Legislature has vindicated its authority over the Church, and its right to take under its cognizance its powers and privileges.

The very first act on our statute book is a very remarkable one, and worded in a very remarkable manner. It is the first act of the first Parliament of James the First, which is worded with the laudable brevity and precision of our Scots Acts of Parliament. "In the first, to the honour of God and halie kirk; it is statute and ordained, that the halie kirk joyes and bruke, and the ministers of it, their *auld* privileges and freedoms. And that nae man LET them." (*i. e.* hinder or molest,) &c.

Observe this emphatic word their *auld* privileges. These, says the Parliament, we know both in nature and extent. They have grown up with the existence of the Church and State past all memory. These we acknowledge and will uphold and protect you in. But, if you attempt to exercise any *new* privileges, these we do not hold ourselves bound to acknowledge and protect, unless we also approve of and sanction them.

By the act 1481, c. 84, the King is declared to have right to present to all benefices.

And by the next act, cap. 85, all persons are prohibited from purchasing, *i. e.* in the language of that day, *procuring* any benefice from the see of Rome under severe penalties.

And by several Acts of Parliament all clerks, *i. e.* clergymen, are prohibited from leaving the kingdom without leave from the King.

Thus Parliament dealt even with the Roman Catholic Church. Indeed it is well known to your Lordships, that the Pope, at all times, had less authority in Scotland, than in any country in Christendom.

I shall now consider how Parliament has dealt with the Protestant Church, and *quomodo et ad quem effectum* the Parliament of Scotland has asserted and exercised authority over it, which will enable us to judge the better, whether the General Assembly had power to pass its act 1834.

In judging of this question, the expediency or in expediency of the act must not be allowed to influence our judgment. It has not influenced mine. But it is not possible to shut our eyes to that question. To me, a member and elder of the Church, and for about fifty years a member of the General Assembly, it cannot fail to be most interesting. And in my decided opinion the Act of Assembly 1834 was quite *uncalled* for, in the circumstances of the Church and country, and most *inexpedient*. If I wanted any confirmation of this my opinion, I find it in the concluding paragraph of the short pamphlet put into our hands, of Sir Henry Moncreiff's History of the Church of Scotland. Would to God we could have that great and good man back again. He

was *zealous* no doubt. But his was not a zeal without knowledge. It was the zeal of a sober mind, and regulated by the soundest discretion. In modern language, he has avowed himself, in the passage I am now to read, to be a *conservative* in Church legislature.

His pamphlet concludes thus, "Amidst all the diversities of opinion, and the division of parties on particular subjects, which appear in the preceding pages, it cannot be denied, by those who are competent to judge on the subject, that the PRACTICAL effect of the Church Establishment in Scotland, on the general information of the people, on their private morals, and on their religious character, equals, if it does not surpass, whatever can be imputed in the same points, to any other church in the world. This is the most important fact which can be stated, and in comparison with *this* fact, every other feature in the laws or practice of any ecclesiastical body is equally *unimportant and uninteresting*."

Here is sound sense—here is the opinion of one of the best, as he was one of the ablest men that ever adorned the Church of Scotland, and this, I think, should settle this question of expediency for ever. But, if this was his opinion, when he wrote this work, twenty or thirty years ago, how much more strongly would it have been his opinion now, when for at least that number of years back, the right of patronage, with hardly any exception, has been exercised in the most considerate and temperate manner. Why then did the Assembly disturb a system of church government, which *practically*, as Sir Henry says, worked so well, both in regard to the moral and religious principles of the people.

But still we must lay expediency out of view, and consider the case as a mere point of law. If in so doing, I had come to the opinion, that the Act of Assembly 1834 was *truly useful* and *expedient*, but that it was not within the power of the Church, then certainly I should have found so with great reluctance. But with my opinion that it is *inexpeditious* and *uncalled for*, of course, I have not any compunctious visitings, in coming to the conclusion, that it is *equally illegal*.

Before entering on the consideration of the different statutes relating to the Church, I must remark, that in every civilized country, there *must* be some court or other judicature, by which every other court or judicature may be either compelled to do their duty, or kept within the bounds of their own duty. Without this the greatest public confusion must follow, and often great injustice to individuals.

I have not had an opportunity of learning how this end is accomplished in most of the countries of Europe; but in France, the *Cour de Cassation*, among its other functions, has the power

of keeping all other judicatures within the bounds of their proper duty. And such of your Lordships as have not had an opportunity of informing yourselves of the constitution and powers of this Court of *Cassation*, will be a good deal surprised to find, as I was, that, although it was established by such a military despot as Bonaparte, it has actually the power of reviewing the proceedings of courts martial, naval and military, if they decide on matters not falling under their proper functions. It is declared as follows :
 “ Il n’y a point ouverture a Cassation contre les jugemens en dernier ressort des juges de paix, si ce n’est pour cause d’incompétence ou d’excès de pouvoir. Ni contre les jugemens des tribunaux militaires de terre ou mer, si ce n’est parcellément pour cause d’incompétence ou d’excès de pouvoir, proposée par un citoyen non militaire.” Now certainly neither the General Assembly of our Church, nor the ecclesiastical courts of any country, can appear to be more independent of this court, or of any civil tribunal, than courts martial are.

And the same authority is exercised over courts martial by the Court of King’s Bench in England ;—of which a well-known case occurred many years ago, when the president and whole members of a naval court martial sitting at Portsmouth, were brought up by warrant of the Chief Justice for disregarding some order of the King’s Bench, and on the floor of that Court, obliged to beg pardon and acknowledge their fault. This authority of the Court of King’s Bench is exercised by what is called the Writ of *Mandamus*, which, on cause shown, is issued, either to compel others to do their duty, or to restrain them from going beyond their duty. Such a writ has been issued to compel a *Bishop* to admit a person as a prebendary in his cathedral—has been issued against the Colleges of Oxford and Cambridge. In short, it is the well-known remedy in cases of excess of power, and of refusal to execute their legal power.

Nay, in the well-known case of the prosecution by Sir F. Burdett against Mr Abbot, Speaker of the House of Commons, Lord Ellenborough thus expressed himself : After admitting the undoubted right and privilege of that House to issue its warrant by the Speaker to commit for *contempt*, if properly so expressed, added, “ But if it did not profess to commit for a *contempt*, but for some matter appearing on the return, which could by no reasonable intendment be considered as a *contempt* of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law and natural justice ; I say, that in case of such a commitment (if it ever should occur, but which I cannot possibly anticipate as likely to occur,) we must look at it, and act upon it, as jus-

“ tice may require, from *whatever* Court it may profess to have “ proceeded.”

And Chief Justice Holt dealt in the same manner with the House of Lords, not in such a case as Lord Ellenborough only supposed, but in the famous case of the Earl of Banbury. He had been indicted for murder as a *Peer* before the House of Lords. But that House found that he was *not* a peer, and refused to try him. He was then brought to trial before Chief Justice Holt as a *commoner* by the name of Nicholas Knollys. He refused to plead, alleging a misnomer, for that he was Earl of Banbury. The Chief Justice took cognizance of this, and sustained the objection of misnomer, and refused to try him, expressly on this ground, that the *House of Lords had exceeded its power*, because it has no jurisdiction in matters of peerage, unless, on a petition by the claimant to the King, His Majesty is pleased to remit the claim to the House of Lords for their investigation and opinion. The sole jurisdiction is in the King, and he need not remit the case to the Lords at all—and in the late case of the Earl of Huntingdon, he did not do so—but on the Attorney-General, Sir Samuel Shepherd, reporting to the King, that the claimant had made good his pedigree, the King issued his writ of summons, and Lord Huntingdon took his seat accordingly. Chief Justice Holt was several times summoned to the Bar of the House of Lords, and required to give an account of his conduct, which he as repeatedly refused to do. The House became greatly excited, and threatened to send him and Judge Eyre to the Tower ; but when they had time to cool, they were glad to let the affair drop.

Your Lordships are also aware of the late judgment of Lord Denman, in the action against the printer of the House of Commons, for printing a paper produced in that House, and ordered to be printed ; Lord Denman held, and directed the jury accordingly, that this did not fall under the privilege of Parliament. Here, too, the Commons took up the matter most warmly, but after many hard words and violent speeches, they were also glad to let the matter drop—thereby tacitly admitting the supereminent authority of the law, to keep all bodies within the strict bounds of their powers ;—and Lord Denman was undoubtedly right. The privileges of the Commons are coeval with the introduction of that House into the constitution, long before the art of printing was invented—and therefore the right to print any thing they chose, however injurious to third parties, could never form part of their customary privileges.

Your Lordships all know the characters of all these Chief Justices ; and while you must acknowledge their great abilities and legal knowledge, you must equally admire that stern independence which could prompt to such decisions, and such opinions of the

supremacy of the law, over even such bodies as the Houses of Lords and Commons.

In like manner, as will appear afterwards, this Court has exercised jurisdiction over presbyteries, when exceeding their powers, or when in the course of their proceedings they encroached on civil and patrimonial interests.

Having thus cleared the way by giving my opinion, and I think showing clearly, that we have jurisdiction over the presbytery in this case, if they have gone wrong in the manner complained of by these pursuers, I proceed to the consideration of the different acts of Parliament, which bear on the connection between the Church and the State.

The first is the act 1567, *cap.* 6, but this merely establishes the *Protestant* religion, instead of the *Roman Catholic*.

The next is the material one 1567, *cap.* 7. This establishes the right that the examination and admission of *ministers* be only in the power of the Church. Now it is plain, that by *ministers* here, is not meant persons already ministers, but persons applying to be admitted ministers, in virtue of a presentation by a patron. But before admitting them, the kirk was to *examine* the candidate. Now I apprehend that this necessarily implies two things,—1st, That it was to be a *personal* examination of the candidate himself, to be taken and had by the kirk, *i. e.* the ministers of the *district*—how such districts were defined at that time, I see not. 2^{dly}, The examination clearly was to be only as to the qualification in point of learning and theological knowledge of the Scriptures, and as to his adherence to, and profession of, the Confession of Faith of Protestantism, as referred to in the previous act as having been settled by Parliament in 1560, and now ratified by this act 1567.

Not a word is said here of any right in the people, either to call or dissent, either with or without cause. The only condition is, that the patron shall present a person *qualified to his understanding*. But this was justly thought not to be sufficient, for though the presentee might be qualified in the *understanding of the patron*, he might not be so in reality, and therefore, before admitting him, the *kirk* was to *examine* as to his fitness and qualification for the ministry.

By this act, coeval with the introduction of Protestantism, and prior to the establishment of *Presbytery*, or any legalized form of church government, “the right of *laick* and *antient* patrons to *present* to “the kirks is expressly reserved.”

Therefore, how the Church now can attempt to oppose openly, or to undermine indirectly, a right reserved by the very act which alone gave to the kirk the power of admitting ministers, seems to me to be not a little strange and inconsistent.

Then the act declares, that the presentation shall be laid, not

before the presbytery or any other church court, for none such existed, but before “the *superintendent of thay pairts* where the benefice lyes.”

For there not only was not any Presbyterian government at that time, but both the early and leading Reformers, and Parliament in this act, appear rather to have looked to, and contemplated a kind of modified *Episcopacy*, as the future ecclesiastical establishment and government of the Protestant Kirk of Scotland; for what was this *superintendent* but a *bishop*, for the name is just a translation of the Greek *Episcopos*.

And therefore this act could not now have been considered as at all in force, if it had not been renewed. But it was renewed and confirmed by act 1581, cap. 99. But even this act 1581, was before the establishment of Presbyterian government.

Then the act 1567 goes on to enact, that if the *superintendent* or commissioner of the kirk, refuse to receive and admit the presentee, it shall be lawful for the patron to appeal to the *superintendent* and ministers of that *province* where the benefice lyes. So that there seems to have been some officer besides these ordinary and minor superintendents of small districts, a kind of *superior* superintendents, like archbishops, over larger districts called *provinces*,—the very name now given to the provinces of Canterbury and York, and I suppose then given in Scotland to those of St Andrews and Glasgow.

And then, if this *arch* superintendent refused to admit the presentee, an appeal was given to the *General Assembly* of the *haill realme*. How this General Assembly was *then* composed I see not, and we were not told by the counsel on either side.

Then the Assembly was to “*decide the cause, which shall take end*, as they decern and declare.” Now what does *deciding the cause* mean? It can only mean as to *qualification* of the presentee on his *examination*. This is a matter purely *ecclesiastical*, and which, by the preceding part of the act, was expressly declared, and rightly declared to be *only in the power of the kirk*. It can mean nothing else. It cannot relate to either call or assent or dissent by the congregation, or any part of it, heads of families or otherwise. No mention is made or alluded to of the congregation having any right to vote or any concern in the matter. The only parties are the patron and presentee on the one hand, and the superintendent on the other, and the only point of discussion between these parties is, whether the presentee is or is not qualified; and the only criterion, by which the superintendent was to judge of that, is by *examination*. Under this act, could the superintendent have said to the presentee, You may or may not be qualified, but I will not examine whether you are or not, because a majority of heads of families object to you, and that without assigning any reason.

Where could our ancestors have found any authority under this act for such a proceeding on the part of the superintendent. This act too was passed when Knox was alive, for he did not die till 1572, and he must have had the chief hand in drawing it up. Therefore under this act, there must have been something for the General Assembly to *judge and decide* ; some issue between the patron and superintendent ; and the only issue is, whether the presentee was a qualified person. And the very same is the power and restriction on the kirk, (I suppose that is the superintendent, for no body is named or *existed*.) He too was equally bound to present a qualified person, under the *jus devolutum*.

Now all this while, there was no government by presbyteries, &c. ; at least no parliamentary recognition of any such government. The government of the kirk remained under the *superintendents*, and soon after, we find them turned into bishops, as we see by the act 1581, *cap.* 102, and by 1584, *cap.* 182.

And by act 1597, *cap.* 235, the King received authority to appoint *parochial ministers* to be bishops or abbots, and to have seats in Parliament ; but this to be without prejudice to the government of the kirk by synods and assemblies, and it was referred to the King to commune with the Assembly as to what authority these bishops were to have. I quote this act only to show, and it shows most clearly, that the Legislature constantly exercised a right to regulate the government of the kirk, and to fix what powers, officers, and dignitaries it should have. And thus the Church remained in this unsettled and fluctuating state, under superintendents, and bishops with presbyteries joined with them, till the passing of the act 1592, *cap.* 116, which in fact is the charter of the *Presbyterian form of church government*.

But before proceeding to consider this act, it is important to make this remark on the two acts 1567, *cap.* 6 and 7. They utterly abolish the *Roman Catholic* religion, and all its ceremonies of the mass and other superstitions, and all authority and jurisdiction of the Pope.

But they carefully reserve the right of *lay patrons*, which had been always an establishment of the *Catholic religion*. Now, how came this reservation to be made, and this delicacy shown to the lay patrons ? Certainly because the right of patronage was a *civil* and *patrimonial* right, not connected with the one religion more than the other, and which religion could not justly and legally affect.

Your Lordships will observe that it was only *laick* patrons whose right was reserved. The rights of *ecclesiastical* patrons fell with their overthrow, and passed either into the hands of the Crown, or of the Lords of erection and other laymen, to whom the Crown granted the property of the dignified Catholic clergy. But

if a bishop had a private landed estate, not part of the temporality of his see, and to that estate was attached a right of patronage, that estate and that patronage certainly was not forfeited by this act 1597.

I believe that Cardinal Bethune, Archbishop of St Andrews, had such private estate, the estate of Monymcal, and kirk now belonging to Lord Leven, and which certainly would not have been forfeited under these acts which abolished the see of St Andrews.

Now I come to the consideration of the act 1592, *cap.* 116, which deserves special attention.

It begins by ratifying all *liberties*, &c. *whatsomever*. But what liberties? Not liberties which are acknowledged as belonging to the kirk *suo jure*, or by any *inherent* or *divine* right, but as *given and granted* by the *King* or any of his predecessors; and *declared by former acts*, beginning, however, with the act 1579—and *all other acts made since sync*. It is remarkable that the act 1567, *cap.* 7, is not here mentioned or ratified—probably because it recognized the order of *superintendents*, incompatible with the parity of rank among presbyters.

Then it goes on to ratify the power of the ministers to hold General Assemblies, but under a remarkable *proviso*, “That the King or his Commissioner be present at ilk General Assembly before the dissolving thereof, and nominate the *place, when and where* the next General Assembly shall be holden.” And yet the General Assembly always goes through the form, by the Moderator, of dissolving itself, and fixing the time and place for its next meeting; which, however, it takes care shall be the same time and place which had been already declared by the High Commissioner.

This leads me to observe, that I am afraid our more zealous Presbyterian ministers are misled by, and carry a great deal too far, the maxim, that there is no head of the Kirk of Scotland but our *Saviour*. In the proper sense of the word that is true,—as He is also the Head, properly speaking, of every Christian Church. He is the founder of the Christian religion, the object of our worship, of our faith, of our hopes, and of our fears. And it is also true, that the King is not the head of our Church, in the sense in which he is the head of the Church of England, in virtue of which he can regulate the form of prayer, and do many things, which by his sole authority he cannot do in our Church. But that our Saviour is the Head of the Kirk of Scotland in any *temporal* or *legislative* or *judicial* sense, is a position, which I can dignify by no other name, than absurdity. THE PARLIAMENT is the temporal head of the Church, from whose acts, and from whose acts alone, it exists as the *national* Church, and from which alone it derives all its powers.

The act 1592 then goes on thus: “Ratifies and approves the

“Presbyteries, &c. &c. with the hail jurisdiction and discipline of the said Kirk.” Now what is the jurisdiction and discipline so ratified? Not that claimed in the Second Book of Discipline, or the power of electing ministers and making laws. But only (the words of the act are) “as agreed on by His Majesty in conference had by His Highness with certain of the ministers convened to that effect, of *whilk articles the tenor follows.*” So that whatever power and jurisdiction were claimed in the Second Book of Discipline, or by the ministers at the conference, none were ratified by Parliament, but those specially set forth in the subsequent part of the act. And all the articles so set forth, relate to matters purely *spiritual* and *ecclesiastical*. Then it repeals the Act 1584, cap. 129, and the Act of the same Parliament granting commission to bishops.

Then comes this clause most important in reference to the case now before us,—“And therefore ordains all *presentations* to benefices to be direct to the *Presbyteries* in all time coming, with full power to give collation thereupon.”

This was necessary, because the law, as it then stood, gave that power to the *superintendents*, and then the act ends with an express recognition of the law of patronage in these unqualified terms, “providing the foresaid presbyteries be *bound and astricted* to receive and admit *whatsomever qualified* minister, *presented* by his Majesty or *laick* patrons.”

Here the only limitation on the right of the patron is, that he shall present a *qualified* person, and whether the presentee was qualified or not, the presbytery was to determine by examination, while on the other hand, the presbytery is *bound and astricted* (stronger words could not have been used,) “*bound and astricted* to receive and admit such person so found *qualified* by them *after due examination.*”

Not a word is said, not a hint is given, in this most important and fundamental Act, of any right in the congregation, or *any part of it*, to interpose themselves between the patron and the presbytery. No authority is given to the presbytery to order a Call and to moderate in it, and if possible still less authority is given to the presbytery to interpose a *veto* of part of the congregation against the receiving and admitting the qualified presentee.

Now this Act 1592 was not passed till after Andrew Melville had returned from Geneva, and imported all the strict principles of Calvin, and his forms of church government. So that in the very fervour of these Calvinistic principles, no such right as that now claimed by the General Assembly, and acted on by the presbytery in this case, was claimed by the reformers of that day, or if claimed, was not allowed by Parliament. Therefore, on what principle,

and by what authority the kirk can now claim a power of enacting a regulation as to the admission of ministers, going not only so far beyond, but absolutely at variance with this their *Great Charter*, (the only title on which it can stand as the *National Church*) I cannot discover or acknowledge, with reference either to the constitution of the church itself, or to its connection with the Legislature which created it.

Then comes the next act, chap. 117 of the same year, which provides "always, in case the presbytery refuses to admit any "qualified minister, presented to them by the patron, it shall be "lawful to the patron to retain the haill fruits of the said benefice "in his ain hands."

Here was another opportunity for the church asking, and for the Parliament to grant, a right more or less broad, to the people to give their assent or dissent to the qualified presentee. But no such right is claimed or given. Neither the Reformers of that day, nor the Parliament had any notion of this *vox populi vox Dei*,—this supreme and omnipotent control of heads of families over the *civil and patrimonial and parliamentary* rights of the patron and his presentee.

It is sometimes said that Parliament is omnipotent ; but our Church goes a step farther, and plays viceroy over Parliament itself.

But this act authorizes the patron to retain the *haill fruits* of the benefice in the event of the presbytery refusing to admit his qualified presentee. But he, the patron, must come to this Court to have his right to do so found, and to force the heritors to pay their proportions of the stipend to him, and to get possession of the mause and glebe. And then again, this Court cannot do so, without first reviewing the proceedings of the presbytery, and finding that they did wrong in rejecting his presentee. So that the jurisdiction of this Court over the presbytery, in the matter of the admission of ministers, is rendered not only lawful, but absolutely necessary by this very act establishing Presbyterian Church Government. And your Lordships will observe, that this review by this Court could relate to nothing at that period, but the *examination* of the presentee, and the articles on which they had examined him, whether properly appertaining to the clerical character or not.

Soon after this, Prelacy was restored by the act 1612, and thus, the Parliament again exercised its right to say, what should be the constitution of the National Church. And so that constitution wavered between Prelacy and Presbytery till the act 1690, cap. 5, finally established Presbytery as the form of our National Church Government.

I consider it to be unnecessary to make any remarks on the

vacillating conduct of Parliament during the unsettled and tumultuous periods preceding the act 1690.

Now as to this act 1690 one circumstance is very remarkable. If there was one thing more than another within the compass of the exclusive cognizance and jurisdiction of the Church, it would seem to be the settling the terms of the Creed or Confession of Faith of the Church. But the Church knew that it could not do so, and did not venture to do so, by its own authority. The Church drew up what she thought *ought to be* the Confession of Faith of the Presbyterian Church, but she did not declare and enact by her own authority, that this is and shall be the Confession of Faith of the National Church of Scotland.—No.—The Church presented it to the Parliament, which “by these presents” ratifie and establish the Confession of Faith, *now read in their presence, and voted and approved by them*, as the publick and “avowed confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches.”

Now after this admission, on the part of the Church, of its dependence on the Legislature, and of the necessity of the authority of Parliament to render even its doctrines and creed valid in law, it is inconceivable that it can have the power, by any act of Assembly, not sanctioned by Parliament, to pass an act, trenching on the law of Parliament, and vitally affecting the *civil and patrimonial* rights of individuals.

Nay, this very Confession of Faith not only acknowledges the authority of the civil magistrate, (*i. e.* the King and his magistrates,) but *calls on him* for assistance, as your Lordships know, in the very remarkable words of the 5th section of the 23d chap. of the Confession of Faith,—and in the next section it declares, that even “*infidelity or difference of religion* does not make void “the magistrate’s just and legal authority, nor free the people “from their due obedience to him, *from which ecclesiastical persons are not exempted.*”

After this, for the General Assembly to pretend, that the King, in his courts of justice, has not authority to review the proceedings of church courts, when alleged to have exceeded the bounds of ecclesiastical law, and encroached on civil rights, seems to me to be utterly extravagant.

Then comes the act 1690, cap. 23, anent Patronages.—This act abolished the rights of patrons on *compensation*, and the appointment of ministers to churches, thereafter to become vacant, is vested in the *heritors* (being Protestants) and *elders*.

Now it is not easy to conceive any mode of election which would operate more unequally than this. In many parishes there is but one heritor, in others only two or three; while the number of elders may be unlimited; so that in such parishes the voice of the

heritors might go for nothing. In many other parishes again, there are twenty, thirty, fifty, nay a hundred heritors, while the number of elders may be very small; and here, of course, *their* voice might be altogether lost. So that I think this regulation was not very well advised on the part of the Parliament. But be that as it may, it was made the law at the time.

The heritors and elders are ordered "to name and propose a person (not to the *male heads of families*, but) to the *whole congregation*." So that here again the act 1834 runs counter to the law of the land as then established, and the person so proposed to the *whole congregation* "was to be either approved or disapproved by them." And if *they* disapprove, *i. e.* even the whole congregation, they are not to be permitted to do so by a *veto*.—No.—"The disapprovers (*i. e.* whatever be their numbers) are to give in their reasons, to the effect the affair *may be cognosced upon* by the presbytery, by whose determination the calling and entry of a particular minister is to be ordered and concluded." So that the presbytery was not to be guided by the mere number of disapprovers, but by the *sufficiency* and *proof* of their reasons for disapproving. And if on cognoscing on these reasons, they considered them to be irrelevant, though proved, they might reject them and admit the minister, whatever might be the *numbers* of the disapprovers. How different is this sober and judicial mode of proceeding, thus enjoined by Parliament in this act, from the rash and arbitrary proceeding by an absolute *veto* established by the act of assembly 1834!

It is curious too that, by this act 1690, it is declared to be "but prejudice of the calling of ministers by the Magistrates, Town Council, and Kirk-Session of the burgh, as they had been in use before the act 1660, and where a parish is partly landward, the heritors are joined." So that it is more than doubtful, if in these cases of burghs, the congregation had any right to disapprove at all, even on reasons.

Matters, however, were not allowed to remain long under the act 1690. In 1711 patronage was restored. The preamble recites, "That by the *ancient* laws and constitution of Scotland, the presenting of ministers did of right belong to the patrons." This is most unquestionably true. It was so under the *Roman Catholic* religion. It was so by the original act 1567 and by act 1592, the first and great charter of the Presbyterian Kirk, which expressly reserved and recognized the right of patrons, and *strictly* the presbyteries to admit their presentees, if found qualified.

Then the preamble goes on to state that great inconvenience had arisen under the act 1690, and great *heats* and *divisions* had been created among the persons authorized by that act to call mi-

nisters. Now these being asserted as facts in the preamble, we must hold that Parliament was satisfied of the truth of these facts.

And this act might have set forth another fact as a reason for repealing the act 1690, that so little was the privilege granted by it valued, that it is notorious, that not above six or seven parishes in all Scotland purchased up the rights of patrons, during the twenty-one years that the act 1690 was in operation.

But so it was, that by this act 1711 the right of patronage was "*restored, settled, and confirmed*" to the patrons, and they were authorized, as formerly, to present a *qualified* person to the presbytery; and the presbytery, as formerly also, is taken *bound and obliged to receive and admit* such presentee.

Now surely it must be admitted, that the General Assembly has no power to REPEAL this Act of Parliament, or to instruct their presbytery to reject every man who comes before them for examination, merely because he has a presentation in his hand. No man can be so extravagant as to maintain such a proposition. But they cannot have a right to do that *indirectly* and *per ambages*, which they cannot do *openly* and *directly*. And I sincerely hope, for the honour of the General Assembly, that it had no such covert and unjustifiable object in view. But, that in the fervour of zeal, the Assembly overlooked the opposition of their act to the law of Parliament, and the consequences which may result from it in every parish in Scotland,—for certainly, if this *veto* is to stand, the patron's right may be set down as *nil*. Now the patronages vested in some families is a valuable patrimonial inheritance, and would sell for a large sum of money, if left on the *old* footing. Many patrons have *ten, twenty*, or I believe even *more* kirks in their gift, which, if brought to sale, would fetch some thousand pounds. But under this act 1834, what would be their value, I believe no accountant or actuary of any insurance office could pretend to calculate.

Now, can the General Assembly have the right thus to trifle with the law of the land, and render nugatory valuable rights established by a solemn Act of Parliament?

It will be observed that this act of Parliament gives no authority for *calls* or for *approval* or *disapproval*, either with or without reason, much less to an arbitrary *veto*, either to the congregation or any portion of it. Indeed calls were never heard of under the old laws of 1567 and 1592; and are certainly not very reconcilable with the law of patronage. Accordingly, I cannot see any evidence of their existence, till the act of Parliament 1649, under the authority of which the General Assembly established what has been called the *Directory*. The act of Parliament 1649 having been repealed at the Restoration, it seems to be more than doubtful if this Directory of the Assembly, acting

under it, can be held to have any effect in law. But hear what Sir Henry Moncreiff says of it, page 34 of small edition,—“ If a majority of the *congregation* dissented, (not heads of families observe) they were to give in their *reasons*, of which the presbytery were to *judge*. If the presbytery should find their dissent founded on *causeless prejudice*, they were notwithstanding to proceed to the settlement of the person elected.”

Now this was the proceeding of the Church itself, when vested by Parliament in 1649, almost with unlimited authority; when the Kirk had everything in their own hands. And yet they never conceived anything so extravagant as the arbitrary *Veto* created by the Assembly of 1834.

At any rate this Directory was established for a different order of things, while patronage was abolished, and can have no effect now that it is restored.

But while this Directory was in force, the presbytery could not possibly discover, whether the dissenters were or were not actuated by *causeless prejudice*, unless they examined into the grounds of dissent. Therefore this excludes every notion of an *absolute and unqualified Veto*, which, unless examined into, may be founded on the most *causeless and unreasonable* prejudice. Therefore by this very law of the Church itself, drawn up when it had everything in its own power, *Veto* was excluded; and as already said, as little is *Veto* sanctioned by act 1690, when patronage was abolished, and the election was in the heritors and elders, with the consent of the congregation.

So that neither by the law of the Church, nor of the land, is there the least sanction or hint given of a right of *Veto*, either by the congregation or heads of families. This body of men is not recognized by any law, either of the Church or State, as distinct from the congregation at large, till called into existence by the act 1834.

I now come to consider the practice of the Church for nearly a century. This practice of the Assembly proceeded under the *statutory* law of *patronage* on the one hand, and the *unauthorized and assumed* right by the Church, of engrafting on patronage the form of a *Call*, which was introduced and intended for a different order of things. The two are certainly not very reconcilable, and the Assembly, for a great number of years endeavoured, as far as possible, to render the two compatible with each other. Now, how could this be done? The Assembly could not *repeal* the law of patronage,—this was totally out of their power. The only alternative which was in their power was to relax their own usage as to calls, and, unless in some very extreme cases, to sustain any call as sufficient, where there was *no relevant objection* stated against the presentee. The defenders could not deny in

their pleadings, that this had undoubtedly been the practice, and spirit of the decisions of the General Assembly for a long course of years ;—so long and so uniform, that Sir Henry Moncreiff fairly and explicitly states, that he considered the question as *set at rest*. This is what he says on *page 94* of the small pamphlet,—“ The controversies relating to patronage are certainly now, in a great measure, *at an end*. And whether the policy ultimately adopted by the Church, has been agreeable, or contrary to its original constitution, and whether it is at last to be considered as wise or impolitic,—the whole weight of government being uniformly given to the ruling party, it would be equally *unwise* and *ineexpedient* to disturb the decisions of more than half a century, and to *agitate* the country anew by controversies, which, with the influence of government on one side, would always have the same termination.” Here again we have the opinion of his sober and practical mind. And yet this act 1834 goes to revive, with tenfold virulence, those very controversies which he thought were *set at rest*,—for this *Veto* goes infinitely beyond what the most zealous of our former clergymen ever contemplated, or I believe would have agreed to.

But while the defenders could not deny that such had been the current of the decisions of the Assembly, they attempted to lessen their weight and effect by a most extraordinary argument, that they were not so much to be considered as the decisions of the Assembly, as of a particular party which had contrived for years to obtain a majority in the Assembly. If so, what becomes of the Act 1834 ? This then must also not have the weight of a real Act of the Church, but only of another party, which at present has also contrived to obtain a majority in the Assembly.

But away with such arguments on both sides ! Both must be held as the decision and acts of the Church, and, as far as the authority of the Church goes, of equal, though of opposite authority. But there is this material difference between them,—the one party supported, as it was their duty to do, the statutory law of the land, and the *civil* and *patrimonial* rights of patrons established by that law ; while the act 1834 makes a direct attack on the rights of patrons, and flies in the face of the law of the land.

I now come shortly to consider some of the cases which have been quoted to us. I pass over those cases, where an obnoxious settlement, and the presentee under it, was got rid of, by correspondence and compromise between the parties. No legal conclusion can be drawn from such cases, and they never came, and could not come, under discussion in this Court.

But the cases are numerous, and I need not particularize them, in which this Court found the patron entitled to retain the stipend, as in a vacancy. Now, as I have already said, the Court could

not find this without a thorough investigation and inquiry into the proceedings of the Presbytery, and a judgment that, in the settlement under review, that body had done wrong,—clearly establishing the control of this Court, even in cases purely ecclesiastical in themselves, but in which, in the administration of ecclesiastical law, the presbytery had exceeded their powers, and trenched on and injured civil rights.

Therefore, in my humble opinion, we have a right to inquire and decide whether, in this case, the presbytery, in the course they took of rejecting this pursuer, Mr Young, *avowedly* on the *single* ground of this *veto*, without examination of his qualification, acted in the proper discharge of their ecclesiastical functions, and did not injure his or his patron's civil and patrimonial rights.

In determining this point in this case, we are freed from a difficulty which seems to me, very unaccountably, to have embarrassed our predecessors,—I mean that no other person has been presented and inducted by the presbytery into this living,—so that, if we are of opinion that the presbytery did wrong, and that we can and ought to give redress, we can do so without interfering with what our predecessors seem to have considered as a sacred character, which they could not touch or recall,—I mean the ceremony of ordination conferred by the presbytery on the minister whom they had thus wrongfully admitted. Certainly this Court could not revoke or annul the *ordination*: The man would remain an ordained minister, as contradistinguished from a mere licentiate, with power to administer the sacraments, and might officiate at baptism or the Lord's Supper wherever he was invited to assist. But it did not necessarily follow from his ordination, that he must hold and retain the benefice into which he had been illegally admitted. Ministers are often ordained *ad ministerium vagum*, as I believe it is called, as is the case, I believe, with all the missionaries who are sent out by the Church to India and other heathen countries. But how our predecessors came to be of opinion, that such a man's ordination should convert an *illegal* appointment into a *legal title* to the very office into which he had been thus *illegally* intruded, I cannot understand. In my humble opinion this Court, having found his admission to be wrong, should have ejected him from the benefice, just as they would eject a tenant or any man, who, on a title found to be illegal, had got into the possession of a house or a farm. Suppose a presbytery, by mistake, (or if it were supposable, even, in the present temper of the Church, by design,) to present, under their supposed *jus devolutum*, a person to a church before the six months allowed to the patron had expired: In the first place, if the patron heard of this attempt, and applied to this Court, I suppose your Lordships would not have the least hesitation to grant an interdict against the presbytery proceeding

farther; and if they presumed to proceed in the face of the interdict, that you would punish the members of the presbytery who concurred in the breach of interdict, as you would do any other persons guilty of such a contempt. But suppose, in the face of the interdict, they were actually to proceed to ordain and induct the man into the benefice, would your Lordships permit this? I cannot conceive it; and if you did, you would furnish the Church, through its presbyteries, and by their own tortious and most illegal acts, with the means to acquire the patronage of as many parishes as they choose to usurp.

But we are free, in this case, from all embarrassment of that kind. The presbytery hitherto, I understand, has not gone farther than to reject the pursuer; so that every thing remains open. Then the question comes to be, what ought we, and what can we, do? In the first place, to prevent farther wrong, I think we ought to discharge and interdict the presbytery from proceeding to admit any other person to this living; and, secondly, to find, in terms of the declaratory conclusions of the libel, as set forth in the printed summons now before us.

The first thing we are asked to declare is, "that the pursuer, Mr Young, was legally, validly, and effectually *presented* to this church." Surely of this there cannot be a doubt. It is not disputed that Lord Kinnoull is the patron of the parish of Auchterarder; it is not disputed that he presented in due time; and, lastly, it is not disputed that the deed of presentation was in due and legal terms.

The next proposition which we are asked to declare is, "that the presbytery was bound to take trial of the qualification of the pursuer, and, if found qualified, to receive and admit him to this parish, *according to law*." Your Lordships will observe, that this conclusion is cautiously worded. In the admission they are only required to proceed "*according to law*." This does not preclude their proceeding to moderate in a Call, as one of their number, Mr M'Kenzie I think, required them to do. Here, however, the presbytery acted consistently, for it would have been absurd to order a Call, after having absolutely rejected the presentee by their previous *veto*. But they choose to substitute this new and unheard form of *veto*, for the former *consuetudinary* form of a Call. This, I hold, neither the Assembly nor the presbytery had a right to do. The form of Call itself, as in connection with the right of patronage, rests on very *doubtful* authority. It has no sanction in law but long usage, and certainly the Church has no right to abandon it, and substitute another form in its place. If the form of Call is given up, then patronage will stand, as it did originally, without any check or limitation, except as to the personal qualification of the presentee.

The summons then proceeds to have it found in substance, That the rejection of the pursuer, without examination, and on the ground of this *veto* alone, was illegal, and injurious to the patrimonial rights of the pursuer, and contrary to the provisions of the statutes and laws libelled. *I am most clearly of that opinion, and that we are entitled so to declare.*

Then the summons proceeds, that if the presbytery persist in refusing to take trial of the pursuer, and, if qualified, to admit him, that HE, Mr Young, shall have right to the stipend, manse, and glebe, for crop 1835. Now, as to this I have doubt, because the law is silent on this head; and the only remedy given by the statutes is, that the patron shall have right to retain the stipend, as in a vacancy.

And then there is a clause, to have the presbytery and collector of the widows' fund ordained not to trouble and molest the pursuer in the enjoyment of the stipend *for his life*. Of this, of course, I have also doubts; but, on the other hand, I have as little doubt, that no *other* person ever can have a legal right to the stipend, unless the pursuer is rejected on examination, as not properly qualified.

As to the widows' fund, that is not before us. No appearance was made for the Collector; and if we find that the patron has right to retain the stipend, it will be for the purposes *authorized by law*; and if the Collector thinks he has a right to claim it, he can do so, and if found entitled to it, the patron must pay it over to him, and not apply it in any other manner.

Such, my Lords, is my opinion, which I have not formed till after a very careful study of the subject in my own closet, subject always to what I may learn from the superior learning and abilities of your Lordships.

Tuesday, February 27.

THE LORD PRESIDENT.—“ LORD GILLIES.”

LORD GILLIES.—MY LORD—I entirely concur in the opinion which has now been delivered by your Lordship, and generally in the sentiments you have so well expressed; and that I may not weaken their force, I shall endeavour, as far as possible, to avoid any repetition of them.

This is represented to be a case of great importance, and it certainly has received all the attention and consideration which its importance deserves. We have been favoured from the Bar with an argument of unprecedented length, and displaying on both sides the greatest talent, learning, and eloquence.

The Act of Assembly, of which we have heard so much, is entitled, erroneously I think, an Act on the Calling of Ministers; and as to the practical consequences of it in the present case, the defenders, in the course of their argument, have asked, Are you by your judgment to render the Call a mockery?—In answering this question I would begin by asking another of the same sort, Is patronage to be rendered a mockery?—using this word in the sense in which the defenders have used it, when speaking of the Call. What is a Call? This question has often been asked, but has never yet been distinctly answered. Its history is buried in obscurity. It seems to have been the creature of practice,—different at different times. My friend the Solicitor owned his inability to point out any express authority for it, but said that it is law. If it be law, it is practice alone that has made it so. This is admitted, and if so, it must be regulated and controlled by the practice to which it owes its existence. Now we know with certainty, that for more than half a century, what is termed an *active* Call, *i. e.* a popular call by a majority, has never been required.

And the Call *has been* practically a mockery, as the defenders term it. Nothing we do can make it a mockery, more than it has been made by the Assembly itself.

What is patronage, is not a question. We all know what *it* is, —a valuable patrimonial right secured by statute, existing for ages with some temporary interruptions, and which the patron holds by a tenure as sacred as he holds his property, or the lands to which it may be attached, if feudalised, as it may be, and often is. It is bought and sold. It is a subject of commerce, and has often been sold under the authority of this Court. A society, calling itself the Anti-Patronage Society, is said, within these few years, to have purchased several patronages.

It is said to be a trust, and truly, for all our property, all the gifts of nature and Providence, are held by us in trust, and we shall all have to account for the use we make of them.

To a certain degree, patronage, from the nature of the thing, partakes more of a trust; but in so far as it does so, the law has adjoined to it certain qualifications and conditions, intended, and sufficient to prevent its abuse. The patron must have some qualifications. The presentee must have other qualifications, of which the presbytery is to judge; and the latter are such, if the Church does its duty, as to preclude any abuse of the right of patronage. That, by a judgment in favour of defenders, patronage would be rendered a mockery, is, I conceive, undeniable. What is a right of which the exercise may be prevented, or defeated, by the arbitrary will of a third party? The situation and powers of the patron, will become analogous to those of the chapter in the election of a bishop. It belongs to the chapter to elect, but I understand that it can elect only one individual,—the person recommended by the sovereign. So the patron may present, but any, and every individual whom he presents, may be rejected.

Now if the question be put, whether the *Call* is to be rendered or *continued* a mockery, or whether patronage is to be rendered a mockery, I have no hesitation in thinking, that the Call must yield to the presentation; and I would at once say, let not patronage be abolished, or defeated, but let the Call continue to be, what it has been for the last fifty years, a mere piece of form.

On looking to the history of the case it will be found, that everything was quite regular as to the presentation. The patron's right to present is admitted. And of presentee, the most ample certificates were given in reference to his qualifications and fitness. Accordingly, the presbytery, *so far* sustain the presentation. They sustain it, but only *so far* sustain it. This is a *novelty*, and to me appears to be illegal.

The presbytery then, gave an opportunity to the male heads of families whose names stand in the roll, to give in special objec-

tions or dissents: but it is stated in their minute, that no special objections were given in. Now, suppose that special objections had been given in by a large proportion (say two-fifths) of the heads of families, and that those objections had been declared insufficient by the presbytery. But that afterwards, the objectors being joined by others, sufficient on the whole to make a majority, had lodged *arbitrary* dissents, it does appear to me that the presbytery would have been placed in an awkward predicament, in sustaining the dissents of those, whose reasons of dissent they had previously disallowed. Ultimately a majority did lodge and adhere to arbitrary dissents, on which the presbytery reject Mr Young.

It seems to be admitted that this rejection was altogether illegal, and unwarrantable, *but* for the Act of Assembly 1834, commonly called the Veto Act. On this alone it is defended. Why, I know not, for if it be true that this Court has no jurisdiction, and that the only redress was by appeal to the supreme Church Court, and that their judgment is final, then the rejection by the presbytery, under the same circumstances, would have been as effectual without, as with, the Veto Act:—I mean as effectual in this Court. As it is, however, the *Veto* Act is the sole defence on the merits, against this action.

In these circumstances, it appears to me that there are four questions for consideration.

1. Was this act *ultra vires* of the Assembly?

2. Is the power of the Assembly to make such an act, sanctioned or fortified by pre-existing laws, or general principles of church law?—I mean principles recognized by statute, or by judgments of civil courts. Or, on the contrary, is it not inconsistent with, and a violation of, those laws established by Church and State.

3. Is the jurisdiction of this Court excluded in such a case? Is there any rule or principle by which the party against whom (*ex concessis*) injury is done or threatened, is precluded from obtaining redress, or protection against such injury, from this Court?

4. Is this Summons properly laid for obtaining such protection or redress? These questions run into each other; and I shall not attempt to preserve a distinct separation of them.

I *first* proceed to consider If this act is or is not *ultra vires*. The Assembly claims legislative power, or rather such a claim is broadly stated by the defenders in behalf of the Assembly. That the Assembly by its acts or resolutions may regulate the doctrine and discipline of the Church is true, and such acts and resolutions are, in all cases, to be treated with great respect. The power, or rather, as I think it may more properly be denominated, the *privilege* of the General Assembly, in so far, does not seem to be disputed. But the argument of the defenders was not thus limited. They maintain that the Assembly is a legislature, and has

legislative powers. This is a great assertion of power. There *is* a Legislature in this country, and I don't well see how two legislatures can co-exist. *This* legislative body is certainly subordinate to the other. But as the existence of two legislative bodies with equal powers seems to be impossible, so, I think it appears a solecism to hold, that there are two separate legislative bodies, of which one is subordinate to the other. If so, the latter may make laws which are good and binding, until altered by the former. It was accordingly said, that if this act was to be altered, or denied effect to, it could only be so by the authority of Parliament. Such a state of things, I own, seems to me irreconcilable with the existence of any judicial power in the country.

But it is said, that this act relates purely to matters ecclesiastical, and is, therefore, within the power of the Assembly.

Whether it has such power, I stop not at present to inquire. But can it be said that, if in legislating on matters ecclesiastical, they injure or annihilate the civil patrimonial rights of an individual, he can have no redress or protection from the Supreme Civil Court against such injury, because the act *relates* to matters ecclesiastical, and *bears* to be only a regulation of Church discipline?

The deposition of ministers, the defenders assert, is a matter *purely* ecclesiastical. Suppose the Assembly to declare, not that no man should be *intruded*, but that no man should be *retained*, in a parish against the will of the people, and then to make a law giving powers accordingly to the heads of families, to lodge arbitrary dissents, and directing the presbytery to give effect to such dissents by deposing or depriving the minister of the parish.

This is not so unreasonable as the *great principle* or alleged fundamental law of non-intrusion, for the people are better qualified to say whether he should be retained, than whether he should be appointed, because they have experience to guide them in the one case and not in the other.

But in such a case, I ask, whether your Lordships would hesitate in giving redress or protection to the person thus attempted to be ejected from his living? or whether such ejection would be effectual, because done in compliance with an Act of Assembly relative to matters ecclesiastical? Attend to the probable situation of a *presbytery* in such a case,—*compelled* to depose a man known to themselves to be *highly* qualified—to be the best minister within the whole range of the Church of Scotland.

Such a case would be a very hard one,—but is not this nearly, or equally so? The presentee has spent his life and his means in qualifying himself for a situation, for *which* this presbytery may *know* that he is qualified, but which he is prevented from obtaining by an arbitrary veto. His *reasonable* expectations are thus disappointed. Greater hardship cannot easily be figured, nor greater injustice. The appointment is lost, and his future pros-

pects are destroyed, for rejection by one parish will probably lead to his rejection by another.

But I think that the defenders in the greater part of their argument betray strong doubts of the legislative powers which they assert. They have referred throughout to the former and previously existing law of the Church. For what purpose? To show that a law made, as they say, by a competent legislature is valid. Surely this is unnecessary. Whatever *had been* the laws of the Church, it was competent for the Assembly to alter them, or to make new laws that are inconsistent with them. I say this on the supposition that this act is purely of an ecclesiastical nature, as the defenders assert; and if this assertion be correct, and legislative power be conceded to them, then it is absurd to refer to former laws in support of this act.

But perhaps former laws are referred to as *proving that this act relates to a purely ecclesiastical matter*, and that it is therefore fortified and sanctioned by those laws. As to this afterwards, as it is more properly embraced in the *second* question to be considered.

For the origin and history of the Veto Act, I refer to the statement of the defenders. After mentioning the numerous judgments of the Assembly, by which presentations were sustained and calls disregarded, they say in their pleadings, “ Gradually, however, the opinion “ gained ground that the decisions which had been pronounced for “ a considerable period on questions of disputed calls, were contrary “ to law.” Again, “ when the Assembly was once convinced that “ the *train of decisions had been erroneous*, it might have been “ competent for the Church Courts to have altered their mode of “ proceeding, *sub silentio* ; that is, to *have disregarded the authority of the more recent decisions* ; and to have returned to the “ course which had been pursued during the stricter period of “ her history.” And again, “ But the Church is a legislative as “ well as a judicial body. *Some respect was held to be due to a “ series rerum judicatarum, however erroneous the majority of “ the Court had come to think those judgments had been.*”

Here again it is said that the General Assembly is a legislative body. So is every corporation. For the nature and extent of its legislative powers, I turn to Bankton, Vol. ii. p. 592, who there says, “ The jurisdiction of the General Assembly is either constitutive or judicial. The first consists in making acts and canons ordering the method of proceeding in matters before them, and other affairs touching the discipline and government of the Church, *in the same manner as other corporations make BYE-LAWS.*” Not legislative but constitutive powers, are assigned to it by Bankton. Thus its power is just that of making bye-laws, — a *privilege* (properly speaking) of corporations. Every corporation has privileges. The power of making bye-laws is one of its

privileges. I certainly mean and wish to say nothing disrespectful to the Assembly. On the contrary, I feel great regard and veneration for it. It holds, and properly holds, a high place in our constitution ; but as to its legislative powers, I humbly think with Bankton, that they are just analogous to the powers or privileges of corporations generally, to make bye laws. Its laws are perfectly good, if they are completely consistent with the law of the land, and do not interfere with civil rights,—but good for nothing, if inconsistent in any degree with either. Good also, if ratified by Parliament—as are the bye laws of the town of Edinburgh, and other corporations.

But what was the law at the date of this act ? It is *admitted* that there had been a train of decisions for a long course of years—a *series rerum judicatarum*—by which settlements were made or sustained, without, or with only a *pro forma* Call.

Sir Henry Moncreiff says, p. 81, “ But the principle was ultimately avowed and adhered to, that a presentation to a benefice was in all cases to be made effectual, independent of the merits of the Call or concurrence. Cases, as has been already stated, have sometimes occurred, in which presentees have been set aside. But this can scarcely be shown to have happened in Dr Robertson’s management, merely from defects in the concurrence from the parish.” And again, at p. 84, he says, “ The great majority of the Church are convinced that the system of patronage, so long resisted in the church courts, is at last completely established. Even many of those individuals who held a different doctrine thirty or forty years ago, do not think it expedient in the present times, to revive a controversy which such a long series of decisions in the Supreme Court is held to have settled.”

But, long before, the law was considered as settled—thus, in the Lanark case, it was argued on the part of Dick, that “ there is a wide difference betwixt a single presentee, and that of competing presentees. In the former case the presbytery cannot overlook a presentation and settle a Church by a popular Call, which would be a gross contempt of the laws of the land.” Of this contempt I think the defenders have been guilty. What was the law of the land, is still *the law of the land*, except as ALTERED by the Assembly. Can it alter the law of the land ?

This argument for Dick is not authority ; but I quote it to show the understanding of civilians as to the law even in 1752. The paper was drawn by President Craigie. From that period down to the year 1834, there has been a *series* of judgments in conformity to this doctrine. If this does not settle the law, what does ? There is written and unwritten, statute and common. How is the last expounded, or known, but by the general understanding of the country, and above all by the reports and decisions. Blackstone, v. i.

p. 68-69, says, " It is an established rule to abide by former precedents, where the same points come again in litigation : as well to keep the scale of justice even and steady, and not liable to waver with every new Judge's opinion ; as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter or vary from, according to his private sentiments : he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land ; not delegated to pronounce a new law, but to maintain and expound the old one," &c.

The series of decisions are here of the more importance, when you attend to the ground on which they rest, viz. that they were agreeable and in conformity with civil law. The Assembly disregarded the Call and obeyed the presentation, because such was the law of the land, and by that law they were bound. The whole of the defenders' argument strengthens this view of the case. The Assembly is by them represented as always friendly to Calls—active Calls. But such were dispensed with, and why ? because the law of the land was in favour of presentations.

But it seemed to be argued, that decisions of the Assembly were not those of the body itself, but of the ruling party at the time, led by *Dr Robertson*. Of this eminent person, a life has been wrote by Dugald Stewart,—a work which no one can read without regretting when he comes to its end : It may truly be said of it—and there cannot be higher praise,—that it is worthy of its subject and worthy of its author : It has just one fault,—it is too short,—a complaint not often made against books or speeches. In that work I find the following passage :—" The circumstances understood to be necessary for constituting an adequate call, were unsusceptible of a precise definition. The unanimous consent of the landholders, elders, and heads of families, was seldom to be looked for ; nor was even an absolute majority considered as indispensable, if the concurrence afforded a reasonable prospect of an harmonious and useful settlement. This principle of decision was so vague in itself, and so arbitrary in its application, that much was left in the church courts to the private judgment of individuals, and much to the prejudices and passions ; while the people, finding that a noisy and strenuous opposition seldom failed of success, were encouraged to prosecute their object by tumult and violence. Many of the clergy, considering it a matter of conscience not to take any share in the settlement of an obnoxious presentee, refused on such occasions to carry into execution the orders of their superiors ; and such was the temper of the times, that the leading men of the Assembly, although they wished to support the law of the land, found themselves

“ obliged to have recourse to expedients ; imposing slight censures
 “ on the disobedient, and appointing special committees (whom it
 “ was found sometimes necessary to protect by a military force,)
 “ to discharge the duties which the others had declined.” This
 passage I at first supposed to be wrote by Mr Stewart,—a mis-
 take occasioned by the mode in which the work is printed ; but I
 have since discovered that its author is Dr George Hill, and Mr
 Stewart declines giving his own sentiments on the subject. But
 still though it may be truly said that these decisions were those of
 the ruling party, they are those of the Court,—a Supreme Court—
 and latterly almost, if not entirely unanimous. If this, however,
 forms any objection to their authority, possibly the same objection
 might be stated to the *Veto Act*, for that also is but the act of the
 ruling party for the time.

But what is this act ? We are not called upon to judge of its
 expediency. The question is, if it be, or be not, *ultra vires* of the
 Assembly ? But in judging of this question, I am entitled and bound
 to look at its provisions, and when I do so, I, in the first place, find
 that it introduces a *new* element of government into the law of the
 country, in so far as it empowers the heads of families, or a ma-
 jority of them, to interpose an *arbitrary veto* in matters directly
 affecting the rights and interests of others, and bestows the *veto* on
 persons who have no legal title to object to presentation. This is
 a new power, and that new power is given to new parties—I mean
 persons not known or acknowledged to have any right to interfere,
 —actually found to have no title to object to the presentation or set-
 tlement. This was expressly decided in the Kiltarlity case, to be
 afterwards noticed ; and yet on those persons, in the settlement and
 ordination of a presentee, there is bestowed, by this act, an impe-
 rative, uncontrollable, final, and arbitrary veto.

This *veto* I conceive to be *unconstitutional*, and inconsistent
 with principle, political and moral. No such thing is known in
 our laws, or, so far as I am aware, in the laws of any country since
 the establishment and existence of the tribulation power in Rome.

The sovereign of this kingdom has been said to have a *veto*, but
 incorrectly :—The sovereign is one branch of the legislature, and
 his *consent* to any law is necessary :—As well might it be said that
 the House of Commons, in rejecting a bill passed by the Lords,
 exercised a *veto*.

A man may do with his own what he chooses. He may, with-
 out giving reasons, use it or abuse it, according to his inclination.
 Where there is slavery the slave-owner may command, or prohibit,
 or punish, as he pleases. *Stat pro ratione voluntas*, was the maxim on
 which slaves were ruled, or rather tyrannized over and tortured at
 Rome. But I lament to see this maxim, in any situation or circumstan-
 ces, adopted by the people of Scotland, and sanctioned and counte-
 nanced by the General Assembly of our national Church. I said,

and,—with all submission, and certainly not meaning to give the smallest offence,—I must repeat, that in this respect, *the act* appears to me at least, not to be easily reconcilable with moral principle. The power it gives is of the worst and most odious sort, —a power, not to choose, but to reject. Such is the main provision of this act,—the provision by which its efficacy is secured. It gives to the people, not a power to elect, for they have no right of election, but a power to declare their disapprobation or *dislike*, and to give effect to that disapprobation by an absolute and final rejection of the presentee, however worthy and well qualified. There is recorded a saying of black witches, meaning those, probably, who were deemed the most wicked and depraved of that unhappy and misguided, but innocent and most persecuted class of human beings, that they had power to do hurt, but no power to do good. Now, really the people seem placed in a similar situation:—They may condemn, but cannot approve; they may hiss, but cannot applaud. I do not think this a good power for the people to exercise, even if it were legal.

But, *secondly*, the act of Assembly 1834 is liable to this objection. It is maintained, how truly I shall afterwards consider, that the fundamental law is, that no one shall be intruded upon a congregation contrary to the will of the people. This has been called “the great principle” on which the Assembly proceeded, and by which its proceeding is justified.

Now, to such an act, it seems to be a fatal objection, that it manifestly and avowedly violates and subverts the rule or principle on which its authority rests. For I find that it is provided by the 17th regulation, “That cases of presentation by the presbytery *jure devoluto*, shall not fall under the operation of the regulations in this and the relative act of Assembly, but shall be proceeded in according to the general laws of the Church applicable to such cases.” From this it is clear, that a person may be intruded on the congregation when the presentation comes to be exercised *jure devoluto* by the presbytery,—for the people have no veto against their presentee. Thus on the face of this act, there appears a provision, which violates and outrages the very principle on which it is professed to be founded.

Of this measure, I cannot so well express the view in which it strikes me, as by repeating the answer made by my learned, accomplished, and excellent brother, when questioned before the Committee of Parliament as to a scheme, called Crosbie’s scheme, and said to be the worst. “It is assuredly altogether speculative. “Nobody can say that it ever existed in the Church of Scotland. “Nobody can say that it ever existed in any established church. “Nay, nobody can say, so far as I am aware, that it ever existed “in any Secession or Voluntary Church. It is absolutely without “precedent,—utterly unknown to all experience. Then it is a

“ scheme which, according to my view of it, supersedes the presbytery, and supersedes the kirk-session, and supersedes the heritors.”

As to this claim of legislative power, I have one observation yet to make. If the claim is good, there is a union in the same body of judicial and legislative power. This is *reprobated* by every political writer. I am aware of the Barrier Act, requiring the concurrence of the presbyteries; but that does not affect my argument. If the General Assembly of the Church combines the legislative with the judicial power, and if its judgments must *take end* in it as a court, then its power is indeed supreme and unexampled. But it is said that this is only in matters ecclesiastical, which obviates the danger. But to what cases do they apply the above term? Why, to all cases in which the Church is in any way or degree concerned, — to all cases affecting the discipline or government of the Church. And *all* such cases, however deeply involving civil and patrimonial rights, are maintained to be subject to the laws of the General Assembly, which laws, again, are to be administered and *finally* judged of by the Church courts. I hold the converse of this doctrine to be true; and that the Assembly, in regulating, or affecting to regulate, the discipline of the Church, has no power to make any law by which civil and patrimonial rights are invaded; and if such are notwithstanding made, that they are *ultra vires*, and that it belongs to the Civil Court to afford redress or protection against them.

One observation more on the legislative power of Assembly. The executive power, the Sovereign, is one branch of the Legislature. But the General Assembly is independent of the Sovereign, whose consent is not required to any of its acts. There is no known mode, or form, in which his consent can be asked or given to them. Now recollect, that on his accession, the Sovereign must swear, that he shall inviolably maintain and “ preserve the aforesaid settlement of the true Protestant religion, with the government, worship, discipline, rights, and privileges of this Church, as established by the laws of this kingdom.”

So far as depends on Parliament, the Sovereign can properly and safely take such an oath. The existing laws are known to him. These laws may be altered, or other laws made for the *manifest benefit* of the subject; but such can only pass *with consent* of the Sovereign. With the Assembly's legislation it is *otherwise*. It may make laws without the consent of the Crown, and those laws made without his consent, and perhaps contrary to his will, he yet must swear that he will maintain and preserve.

I state this as showing the extraordinary and extravagant consequences that may result from acknowledging in the Assembly any legislative power beyond that of making bye laws, as Bankton says.

I shall now proceed to the second question, and consider the alleged effect of former laws in sanctioning or destroying the authority of the *Veto Act*.

In the act of Assembly 1834, it is declared “to be a fundamental law of the Church, that no pastor shall be intruded on any congregation contrary to the will of the people.”

This, I have said, is termed the great principle. That this fundamental law, as it is called, or *great principle*, has sometimes been asserted by the Assembly may be true. It may have *made laws*, as the defenders would say, to the above effect; but as I say, passed *resolutions*. As laws they never were considered—certainly never obeyed—and as resolutions, they were known at the time, as Sir H. Moncreiff says, to be nugatory, never expected, or meant to be acted on—resolutions of words, not rules of action.

So far as I see, this great principle is first broached in the Second Book of Discipline—and attend to what it says, chap. 12, sect. 9. “The libertie of the election of persons callit to the ecclesiasticall functions, and observit without interruption swa lang as the kirk was not corruptit be antichrist, we desyre to be restorit and retenit within this realme, swa that nane be intrusit upon ony congregation, either be the prince or any inferior person, without lawful election, and the assent of the people owir quham the person is placit; as the practise of the apostolical and Primitive Kirk and gude order craves. And because this order quhilk God’s word craves cannot stand with patronages and presentations to benefices usit in the Paipe’s kirk, we desyre all them that trewlie fear God earnestlie to consider, that for swa meikle as the names of patronages and benefices, together with the effect thair of, have flowit fra the Paip and corruption of the canon law only, in so far as thereby ony person was intrusit or placit owir kirks having *curam animarum*,” &c.

Here the principle is announced: But that is not all. It is declared that this order or principle *cannot stand* with patronages and presentations—they are *inconsistent, incompatible*. Had the Assembly possessed the legislative power now claimed for it, a law to the above effect would have been made. But it was *then* thought that laws could only be made by Parliament. The Legislature was therefore resorted to, and the acts 1592 were passed. Now observe—the great principle is asserted in the Book of Discipline. Is it confirmed by the acts of Parliament? No. But this is not all, the book declares that this principle *cannot stand* with patronage:—the two are incompatible. But the act establishes patronage, and thus, according to the Book of Discipline, negatives the great principle or fundamental law.

I pass over entirely the conference, held in the interval between the publication of the Second Book of Discipline and the act 1592.

Of that conference there is no authentic record ; by it nothing could be concluded without the sanction of the Legislature, and its result must therefore be sought for, and can only be found in the act of Parliament 1592.

As to the alleged compact between the Church and the State, I observe in passing, that it is an improper term. There can be no compact, properly speaking, betwixt the Legislature and any other body in the State. Parliament, the King and the three Estates of the realm are omnipotent, and incapable of making a compact, because they cannot be bound by it.

But I return. Such was the state of fundamental law in 1592 ; it was rejected by Parliament. Let us trace its fate afterwards. Presbytery was abolished in twenty years after by the Act 1612, but it was again restored in 1649, and patronage was abolished.

Then came the celebrated *Directory* 1649. At this time presbytery was *triumphant*, and now, therefore, if ever, it was to be expected, that the great principle would be asserted.

But what happened ? The Parliament, or convention, is silent on this point. But the General Assembly may be expected to speak out, and so it does in the Directory. For the third section is as follows : “ But if it happen that the major part of the congregation dissent from the person agreed upon by the session, in that case the matter shall be brought unto the presbytery, who shall judge of the same, and if they do not find their dissent to be grounded upon causeless prejudices, they are to appoint a new election in manner above specified.” But if they *do* find it *so* grounded, what are they to do ? Why by necessary implication they shall, as ordered in the preceding section, “ proceed to the trial of the person thus elected, and, finding him qualified, to admit him to the ministry in the said congregation.” But it is said that this does not suppose that the presbytery is to inquire. Now, without inquiry and examination, how *could* they know whether *causeless prejudice* existed or not ?

Here I cannot help expressing a wish, that a similar inquiry had been enjoined, and had taken place in this case.

Perhaps, probably, the result would have shown that the dissenters were *founded* on causeless prejudices. Mr Young perhaps read his sermons, or preached from *written notes*. In many districts this is very unpopular, and very possibly may have caused his rejection, but I am here speaking on mere conjecture. I know, however, that Sir H. Moncreiff, who has been so often, so highly, and so justly praised in the course of this discussion, preached from written notes ; and Dr H. Blair read those sermons, which, so long as the English language endures, will continue to afford delight and instruction, and with the most persuasive eloquence, to inculcate rational piety, and the performance of every moral and religious duty.

But leaving this, how stands the great principle, negatived by the act 1592, and absolutely violated by the Directory 1649. After this follows a short but eventful period, distinguished by the victorious career of Cromwell. During his powerful dominion, we may be sure that all civil power, all power of the State, centered in him, and that no pretension to such power would be listened to on the part of the Presbyterian Church.

Passing over that period, we come to the Restoration, followed by the abolition of Presbytery, and the violent and tyrannical restoration of Episcopacy, under a government so justly stigmatised by the Dean, a period of twenty-eight years.

We come then to the Revolution. Prelacy was abolished by Act 1689, c. 3. Next follows the Act 1690, c. 23, for settling the Church government. By this act patronage was abolished, and *so far* the act 1592 was altered. I give no opinion as to this abolition, but we know historically, that the measure was disapproved of by William. Most important is the disapprobation of such a man, the first sovereign who adopted and practised the doctrine of toleration, and whose life was spent in a glorious struggle for religious and civil liberty, and the independence of Europe.

This act abolishes patronage. I do not ask if it gives any countenance to this Veto Act, to an *arbitrary* veto, for such a thing is not sanctioned, or mentioned, or alluded to, or hinted at so far as I know, in any law, civil or ecclesiastical, of any State, or any Church in the known world. But does this act 1690 countenance the great principle of non-intrusion? On the contrary, it manifestly sets aside that principle. It enacts, "That in case of
" the vacancy of any particular Church, and for supplying the
" same with a minister, the *heritors* of the said parish (being Pro-
" testants,) and the elders, are to name and propose the person to
" the whole congregation, to be either approved or disapproved by
" them, and if they *disapprove*, that the diapprovers *give in their*
" *reasons*, to the effect the affairs be cognosced upon by the pres-
" bytery of the bounds, at whose judgment, and by whose deter-
" mination, the calling and entry of a *particular minister is to be*
" *ordered and concluded.*" Now, if the congregation give their reasons, and the presbytery cognosce, and find that the reasons are not valid, what then? Why, the presbytery must proceed and settle the minister in opposition to the will of the people, perhaps of the *whole* heads of families.

After this a period of twenty-two years elapsed, and then the act of the 10th of Queen Anne, restoring patronage, was passed. In this act, certainly, the great principle is disregarded!

How then stands the case? The fundamental law announced in

the Second Book of Discipline, instead of being sanctioned, is disregarded or set aside by every subsequent statute; by the act 1592, and that of 1690, and also by the Directory 1649. On what foundation, then, does this great principle rest? On a resolution or resolutions of the General Assembly! The General Assembly may pass any resolutions it pleases, and on *any* subject, and while they exist merely as resolutions, no one *out of the assembly* has a title or interest to object to them. But if it be competent for the Assembly, in virtue of such resolutions, and merely *because* they have passed them, afterwards to legislate and make laws, carrying into effect their resolutions, then their power is manifestly *boundless*.

The power and the practice of passing resolutions are not confined to the General Assembly. There are resolutions of the House of Commons, and resolutions of the House of Lords, and there are also proclamations of the Sovereign; but none of these are laws. Are the resolutions of the General Assembly to have more force? The resolutions of either House of Parliament are entitled to great respect, and still more are the proclamations of the Crown; but if any of these are inconsistent with *law* they are not binding. Nay, Judges are bound by their oath to protect the subjects against them.

The celebrated case of *Ashby versus White and Others* must be known to all your Lordships. Ashby, a cobbler at Aylesbury, had tendered his vote at the election of members for the borough, which the returning officers had illegally rejected. Ashby brought his action against them, which having gone to trial, he recovered a verdict with L. 5 damages. A motion was made in the Queen's Bench in arrest of judgment, principally upon the ground that the question was one involving the privileges of the House of Commons, and over which they had therefore exclusive jurisdiction. Three Judges were of that opinion. Holt, C. J. differed from them, and, with respect to the breach of privilege, expressed himself as follows:—"Privilege is no bar to any action. An action may be delayed, and proceedings thereupon obstructed by reason of privilege, but that ever any legal remedy was taken away by privilege is without precedent. That certainly can never be esteemed a privilege of Parliament which is incompatible with the right of the people, which is to have reparation for the injuries that are done to their rights and franchises in the ordinary and common method of justice. Magna Charta, c. 29, is expressly that 'nullus liber homo disseisicetur de libero tenemento, vel libertatibus, vel liberis consuetudinibus suis, nisi per legale iudicium parium suorum, vel per legem terræ.' Such was the language and sentiments of Holt, a man, whose spotless integrity,

profound knowledge, and noble indomitable spirit of independence entitle him to the lasting gratitude of posterity. The three other Judges, however, differed from Holt, and judgment of course was given in favour of the defendant, in conformity with this opinion of the majority; but a writ of error was brought in the House of Lords, who adopted the argument of Holt, and reversed the judgment.

Then the matter was taken up by the House of Commons, which passed various resolutions, by which, after asserting "that, according to the known law and usage of Parliament, neither the qualification of any elector, nor the right of any person elected is cognizable, or determinable elsewhere, than before the Commons of England, in Parliament assembled,—"

"Resolved, that Matthew Ashby having, in contempt of the jurisdiction of this House, commenced and prosecuted an action at common law, against William White and others, the constables of Aylesbury, for not receiving his vote at an election of burgesses, to serve in Parliament for the said borough, is guilty of a breach of the privilege of this House,—"

"Resolved, that whoever shall presume to commence or prosecute any action, indictment, or information which shall bring the right of the electors or persons elected to serve in Parliament, under the determination of any other jurisdiction than that of the House of Commons, such person and persons, and all attorneys, solicitors, counsellors, and sergeants at law, soliciting, prosecuting, or pleading in any such case, are guilty of a high breach of privilege of this House."

In the face of these resolutions, however, Ashby issued execution upon the judgment against White and the other defendants, and they were taken in execution. It does not appear that the House ventured to proceed against him for his contempt, or to prevent him from recovering the fruits of it.

In the meantime, five other electors, encouraged by Ashby's success, raised similar actions of damages, for which they were committed to Newgate by the House of Commons. This gave rise to a great constitutional question, as to the right of courts of law to inquire into the validity of Parliamentary commitments. But this question was eluded by the prorogation of Parliament, in consequence of which all the parties who had disobeyed the orders of the House of Commons were at once set at liberty. But the prorogation had no effect on the judgment in *Ashby v. White*, which remained unimpeached, and has established the law ever since.

The franchise, or right of voting asserted by Ashby, was ultimately subject to the jurisdiction of the House of Commons. By

that House the validity of the vote which he tendered must in the last resort be decided, and its decision on the merits of the election was final. But Ashby claimed damages, and, judging of that, it was necessary for the Court incidentally to decide, as it did decide, on the validity of his franchise.

The late case of *Stockdale v. Hansard*, which was mentioned by your Lordship, also deserves particular attention. Messrs Hansard had, under the authority of the House of Commons, printed and sold a report laid before the House, relative to a book published by Stockdale; and Stockdale brought an action against Hansard, to recover damages for the libel alleged to be contained in the report. At the trial the Attorney-General, on behalf of the defendants, insisted that the publication was privileged, on the ground that it was printed and sold by order of the House of Commons. In directing the jury upon this point, Lord Denman delivered an opinion which I cannot resist reading to your Lordships. "It seems to me, gentlemen," said his Lordship, "that the only questions for you upon the general issue can be, first, whether the publication was by the defendants at all; and secondly, whether it is a publication of a libel; because on the third ground, namely, that this is a privileged publication, I am bound to say, as it comes before me as a question of law for my direction, that I entirely disagree with the law laid down by the learned counsel for the defendant. I am not aware of the existence in this country, of any body whatever, that can privilege any servant of theirs, to publish libels of any individual. Whatever arrangements may be made between the House of Commons, and any publisher in their employ, I am of opinion, that the publisher who publishes that, in his public shop, and especially for money, which may be injurious, and possibly ruinous, to any one of the King's subjects, must answer in a court of justice to that subject, if he challenge him for a libel. And I wish to say so emphatically and distinctly, because I think that if, upon the first opportunity that arose in a Court of Justice for questioning that point, it were left unsatisfactorily explained, the judge who sat there might be an accomplice in the destruction of the liberties of the country, and expose every individual who lives in it, to a tyranny that no man ought to submit to."

The jury having found agreeably to this direction, the matter attracted the attention of the House of Commons, which, on the report of a committee, passed three resolutions to the following effect:—1. That the order of the House of Commons affords a justification for the sale of any papers whatever which they may think fit to circulate. 2. That no court of justice has jurisdiction to discuss or decide any question of Parliamentary privilege which

arises before it, directly or incidentally. 3. That the vote of the House of Commons, declaring its privilege, is binding upon all courts of justice in which the question may arise.

But these resolutions did not put a stop to the legal proceedings against which they were directed. Mr Stockdale commenced fresh proceedings against Hansard, and notice of another action was served upon other Parliamentary printers, the Messrs Nicholls, on account of an alleged libel which they had printed and sold under the authority of the House. Messrs Nicholls and Hansard, under those circumstances, very properly presented petitions to the House, praying directions how they were to act. The consideration of those petitions was postponed for some time; but finally, the Attorney General moved, and the House resolved, that Messrs Nicholls should be permitted to appear and plead to the action. How far this was consistent with the strong resolutions which the House had previously passed, it is not for me to say, and still less shall I presume to offer any opinion on those resolutions themselves. It is quite sufficient to state, that they were not carried into effect, and that the law was allowed to take its course.

The two cases which I have mentioned are apparently questions of privilege. But their application is obvious; for what is this but a question of privilege, as affecting the General Assembly instead of the House of Commons.

The privilege of the House of Commons, as claimed in those cases, is just analogous to the right or privilege here asserted and claimed by the Assembly in matters ecclesiastical.

The return of members, and hence the franchise, or right of voting asserted by Ashby, were called matters of privilege to be judged of by the House exclusively. So the publishing by orders of the House was termed matter of privilege.

This is just analogous to the right or privilege of the Church, as asserted by the defenders, to legislate and adjudicate exclusively, in matters ecclesiastical touching the discipline and government of the Church,—forgetting that such exclusive right, may be incompatible with the inherent rights of the subject, to have his civil rights tried, and judged of, by the civil law, and the civil courts, of the country.

As to the legislative power of the Assembly, its acts are bounded and limited, as are the resolutions of the House of Commons, by the extent to which they go. If confined exclusively to matters purely ecclesiastical, touching the doctrine or discipline of the Church, and *that only*, they may be good. But if they trench on civil rights, they are *ultra vires*, and good for nothing; at any rate, they cannot deprive the subject of *his* right to vindicate his patrimonial interests in the civil courts of the country, and to ob-

tain from those courts that redress and protection which the law of the land affords him.

The Assembly is entitled to pass resolutions or acts,—for they are substantially the same,—and to such acts or resolutions great respect is due, and all due respect will be paid to them in this court, *so far as they relate to matters purely ecclesiastical*. But if they go beyond those legitimate bounds, and trench on civil rights, this court is not entitled to regard them.

We cannot reduce such acts or resolutions, but we are entitled, nay, we are bound to disregard them, *so far as they are inconsistent with civil law*, or *interfere with rights protected by that law*, which it is our paramount duty to administer.

The reasoning of the defenders seems this. The General Assembly can legislate in matters ecclesiastical. But any thing which has been the subject of a resolution in the General Assembly is, or becomes a matter ecclesiastical—and, therefore, the General Assembly can legislate in that matter. Thus it depends entirely on the Assembly itself. It may convert, by a resolution, any affair of State, any question of civil government at home, or even of foreign policy, into a matter ecclesiastical, and legislate accordingly. The fallacy of such reasoning needs not to be exposed.

True, the defenders do not avow, that their resolutions can convert a civil matter into an ecclesiastical one. But they *do* say, which comes to the same thing, that a fundamental law, or great principle, may be *established* by the resolutions of Assembly, and that this being done, the Assembly, *thence and therefore*, acquires or possesses a power to make *any law necessary for carrying into effect such great principle*. Their resolutions *establish*, for there is *nothing else* to establish it, *the great principle*, and *in virtue of* this great principle, their power to make the Veto Act is asserted. Thus it ultimately rests on the resolutions of Assembly.

On the whole, then, I humbly think, that the alleged fundamental law must be set aside. It is a nonentity, or exists only in words, which were not expected, or truly intended, to produce any practical effect.

But it is said that *collation* belongs to the Church, and that the *Call* is an essential ingredient in that step, and, consequently, falls to be regulated by the Church :—and this is accordingly entitled an act on the calling of ministers. It is, in truth, an abolition of calls.

I already gave my sentiments as to a Call. It was, and is merely the creature of practice, and therefore must be regulated by practice ; and it is admitted that, by the practice of the body which introduced it, it has been a mere form for more than half a century.

But does it appear that, at *any period*, it was necessary for a *majority of the parishioners* to sign the Call? I say parishioners—for until the *veto* act, there was no distinction of *heads* of families from others. So far as I am able to discover, certainly, no such majority was ever required.

But there is still another ground of defence, viz. *Qualification*. It is admitted that the Church is to judge of the qualification of a presentee; and this is said to be a qualification, that the presentee shall be assented to, or not dissented from, by a majority of heads of families or parishioners—I care not which. But I cannot subscribe to this doctrine. The proposition here maintained by the defenders is, in my humble opinion, the most untenable of the whole. What are the qualifications of which the Presbytery are to judge? By the ordinary meaning of words, qualifications are personal. The term qualifications or qualities, in vernacular language, serves to denote what a man *is*, not what he is thought of, by others.

But the question more strictly is, in what sense is the term used in those acts or resolutions from which the Church derives its power to judge of qualification?

Look first at the Acts of Parliament. The term occurs eight times in different acts. Thrice in 1567; once in 1592, c. 116; once in 1592, c. 117; twice in 1711; and once in 5th Geo. 2d.

Let any candid man read those acts, and say whether the term *qualities*, as there used, did, or could by possibility mean the assent of the people or a majority of them. See also the Second Book of Discipline, as mentioned in the Dean's Speech, Pp. 208–209. The matter is, if possible, still more clear if you consult the Directory 1649. In it the acquiescence or consent of the people (necessary by that Directory) is carefully and most clearly distinguished from the qualification and subject of trial by Presbytery. After all this, can it be seriously said that the term *qualified*, as used in the passages to which I have referred, required, or ever denoted or contemplated, the assent or non-dissent of the people as a necessary part of the presentee's qualification?

The interpretation of the defenders, if it be contrary to the plain meaning of the term, is if possible still more inconsistent with the sense in which the term is obviously used in the acts, both of the Assembly and of Parliament. The patron is bound to present a qualified presentee, one whom he understands to be qualified. But how can he do this if the *Veto* is to be a disqualification?

On the whole, then, as to the second question which I was to consider, it appears to me that the Act of Assembly 1834, so far from being sanctioned or fortified by the principles and laws of the Church, ancient or modern, is, on the contrary, inconsistent with,

and subversive of those laws, established both by Church and State.

Third.—I proceed to the third question. Is the jurisdiction of this Court excluded in the present case? This is a most important question. Is there any rule or principle, by which a man against whose patrimonial rights a serious injury is done, or threatened, can be debarred from seeking redress or prelection from the civil court?

But it is said that this is not a civil, but an ecclesiastical question; and that the injury of which the pursuer complains does not *directly* affect his patrimonial rights; that the injury is indirect and incidental, merely consequential, such as must occasionally happen from proceedings of the Church.

I shall not here discuss the soundness of this distinction. Whether well or ill founded, it *certainly* does not apply to the present case. Lord Kinnoull is patron, and Mr Young is his presentee, and what is the injury they complain of? The presentee has been rejected. The right of the patron to present Young, denied and defeated. The trial and admission of ministers is committed to the Church. It is their *right* and *their* duty. This rejection might have happened if the presbytery had examined or *tried* Mr Young and found him not qualified, as they were empowered to do by the law of Church and State:—This would have been a legitimate exercise of their constitutional power. But this they do not do: They reject Mr Young because the heads of families dissent. They did not do this, in the exercise of their constitutional power to try the qualities of the presentee: On the contrary, they *refused* to exercise that power committed to them by law.

When such power is committed to, or vested by law in any body, it is implied that they must *bona fide* exercise it. This implication is clear. But it is not left to implication. By the Act 1592, “The Presbytery is *bound* and *astricted* to receive and admit whatsoever qualified minister is presented by the patron.”

This part of act is said to be repealed, to which I cannot assent. It was repealed, so far as mention is made of the presbytery, by the acts abolishing Presbytery, and restoring Episcopacy. Then came the Acts 1690, c. 5, and c. 23, which, as they abolished patronage, could not, of course, restore a regulation, applicable to patronage exclusively.

Mr Bell admitted, that the act 1690, c. 5, revived the act 1592, but founded on the exception, by which he maintained that this provision was virtually repealed. The words of the act are, “renewing, reviving, and confirming the said act in the whole heads thereof, except that part of it which related to patronage *here-*

“*after to be considered.*” Here is an *express* declaration that Parliament in this act is *to do nothing* as to patronage. It is an excepted and excluded subject. And yet, upon this act the defenders held that the act 1592 stood repealed as to patronage.

Then we come to 1690, c. 23, which abolished patronage, and so far altered the Act 1592. But this act makes no mention of the Act 1592; it only abolishes patronage. Further, this act, as it is the *only* one, under Presbyterian government, which repeals the Act 1592 as to patronage, was itself *so far* repealed by the Act 1711, restoring patronage. The renewal of patronage necessarily revived this regulation as an adjunct of patronage.

But, besides this, which I think the just construction of the act of 10th Queen Anne, it contains these words: “Declaring always that nothing in this present act contained, shall extend or be construed to extend, to repeal and make void the aforesaid twenty-third act of the second session of the first Parliament of the late King William and Queen Mary, *excepting so far as relates to the calling and presenting of ministers, and to the disposing of vacant stipends, in prejudice of the patrons only.*”

Thus it appears that the act 1690 is by necessary implication repealed so far as relates to the calling and presenting of ministers. What follows, or can follow, but that the Act 1592, upon that point, is to be held as law, being *then*, the *only* law on the subject.

But section first of the Act 1711 is, upon this point, decisive. Its words are just as strong as those in the Act 1592. By the latter, the presbytery is bound and astricted to receive and admit, and by the former, viz. the Act 10th of Queen Anne, the Presbytery is “obliged to receive and admit in the same manner such qualified person or persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers presented *before* the making of this act *ought to have been admitted.*” This is manifestly a revival of the Act 1592—or if not, it is a regulation to the same effect.

Is the obligation thus imposed upon the presbytery a *civil* obligation, or is it an ecclesiastical one?—*to be enforced by those on whom it is imposed!* Is it conceivable that this Court should not be able to enforce any civil obligation enacted by act of Parliament. There is no *ratio dubitandi* here.

It is in truth absurd to say that Parliament restored patronage, without restoring the means necessary for making it effectual. The presbytery is bound to receive and admit a qualified minister.

Whether he be qualified or no, the presbytery is directed to try. If qualified, he must be admitted—if found not qualified, he is to be rejected. But it is *only* as found disqualified that he can be

rejected. Here they refuse to take him on trial, and on the reasonable and charitable supposition that he *is* qualified, they refuse to receive and admit him, in direct violation of the Acts 1592 and 1711.

Further, patronage is *admitted* to be a civil right, subject, with all its adjuncts, to be regulated, expounded, and enforced by the civil court. But the question whether patronage exists at all, or exists only in name, is, according to the defenders, a purely ecclesiastical question. This is a doctrine not less absurd in itself than it is inconsistent with many of your decisions.

But before adverting to these—another defence is to be considered, founded on the clause of the Act 1567, which enacts that “the cause being decided by the Assembly, shall take end as they decern and declare,” viz. That the decision of the Assembly is final.

This is a very startling argument, and well illustrates the doctrines of those writers who hold that legislative and judicial powers cannot be entrusted to the same body. If the Church can pass resolutions like that against intrusion, the effect of which, as the defenders say, is to render a political matter an ecclesiastical matter, and to convert the one into the other; and if, in virtue of such resolutions, the Church is entitled to pass laws like the *veto* act, regulating such matters; and if finally these matters are to *take end* in the church courts, their powers are indeed transcendent.

But this act 1567, if the defenders’ interpretation be just, is utterly inconsistent with the existence of patronage as a civil right, which right the act expressly reserves. But the defenders’ interpretation is inadmissible.

This statute, 1567, c. 7, enacts that the examination and admission of ministers be only in the kirk, the presentation of laic patronages being always reserved to the just and ancient patrons. And that the patron present *ane qualified person* within six months. It then provides, that “in case the patron present ane person qualified *to his understanding*, and failing of ane, another, and the said superintendent refuses to receive and admit the person presented, it shall be lesum to the patron to appeal to the superintendent and ministers of the province, and desire the person presented to be admitted, whilk give they refuse, to appeal to the General Assembly, by whom the *cause* being decided, shall take end as they decerne and declare.” Hence it is to be particularly observed, that the obligation imposed upon the patron, in the *first* place, is to present “ane *qualified* person,” but in the subsequent part of the act, the case is put of the patron presenting “ane person *qualified to his understanding*.” But the person thus presented might *in fact not be qualified*, and so it

might be found by the Church on examining or trying him. A judgment to this effect by the superintendent and ministers might be appealed from to the General Assembly, and the cause being decided by the Assembly, shall take end as they decern and declare. Now what is the *cause* here to be tried and decided? It is plainly the qualifications of the presentee, as to which it is not disputed that an appeal lies from the inferior to the superior Church Courts, and that the cause must there take end. But such a regulation has manifestly no application to this case, where, in virtue of the Act of Assembly 1834, there was no trial and no examination. There was no cause such as that pointed at in the Act of Parliament. In truth, there was no cause at all, and the cause could not take end, for it never had a beginning.

Yet it is gravely stated that, against the judgment of the presbytery of Auchterarder, the pursuers can only appeal to the superior Church Court. *What is the judgment to be appealed?* It is a judgment finding that a majority still dissent, after which the rejection follows of course,—a ministerial and not a judicial proceeding.

The presbytery's high duties consisted in what? According to the defenders' argument merely in counting noses, and against their judgment in the discharge of this important duty, there lies an appeal to the General Assembly! It reminds one of the Tellers of the House of Commons. Their office, or their judicial functions, are precisely similar.—But I never heard their report of numbers termed a judgment, nor ever heard of an appeal against it. An appeal is always accompanied with the reasons of appeal. What could *they* be if the veto act is to be obeyed? But, in truth, this is just recurring to the question, Is this a civil or an ecclesiastical matter? In matters purely ecclesiastical the Church Courts are to judge; but matters not purely ecclesiastical are to be judged by the civil court, and decided according to the law of the land.

But, before leaving this act, I have to observe—an observation which applies to *all* the statutes,—that it raises a distinct and separate argument, and, I think, a conclusive argument against the Act of Assembly 1834, and the powers of the Assembly to pass it. This act 1567 “declares, that the examination and admission of “ministers within the realm be only in the power of the *Kirk*.” But what has the Assembly enacted, and what has the presbytery done? They have *not* exercised this power, but, what is far more extravagant, they have delegated it to others. The law says, the Church shall examine and admit; but the heads of families, as empowered by this Act of Assembly, may tell, and in this case have told, the Church, that they are *not* to examine and not to

admit. The Church has given this power, which was vested in the Church by statute, to the heads of families. They have *delegated* their power, which is illegal and unconstitutional, and they have directly disobeyed the statutes, by giving effect to the *veto* of those to whom their power was delegated.

The subject of patronage was much discussed for several years after the act 1711. Many pamphlets were published, valuable as showing the feelings and opinions of parties at the time. Some of them have been sent me, and from one I shall read a quotation, in which mention is made of dissent by the majority of the people—not, however, an *arbitrary* dissent without reason, but one founded on a reason, of which the defenders cannot consistently approve. The pamphlet is entitled “A modest and humble Inquiry into the right and power of electing and calling Ministers,” by a Minister, and is printed 1732. In it I find this passage: “In opposition to the authority of this learned divine, I must repeat the answer of eight ministers who were the most wise of the synod of Fyfe, which I have already mentioned. ‘That the flock ought to give their consent to such as are chosen by pastors and doctors, lawfully called, who can try their gifts by the word of God. The author of *Jus Populi*, adds from Mr Gillespie, though nothing be objected against the man’s doctrine or life, yet, *if the people desire another better, or as well qualified, by whom they find themselves more edified than by the other, that is a reason sufficient, if a reason must be given at all.*’ I answer that it is a sufficient reason why they give not their consent; and if they please, they may, for their own exoneration, give their dissent, for the same reason. But if the dissent of the majority of the parish is founded on no other reason but this, that they pretend they are more edified by another person, and that then the majority have a *negative* over the session, by this reasoning they will have a negative over the presbytery also; for here the majority is both judge and party, nay judge of the presbytery, their judges, and invade that authoritative judging of the qualifications of the candidate for the ministry, which by all Presbyterians has ever been acknowledged to be the presbytery’s right: No doubt, the people have a judgment of discretion of the person’s gifts and abilities, but when these two judgments interfere, must the authoritative judgment yield to the people’s judgment of discretion? Must all be carried before the bar of the popular tribunal? And must that be the dernier resort? *And surely it is, if the people have the negative by their majority, and the presbytery ought not to proceed to the ordination; nay, not only over the session and presbytery, but over the superior judicatories, the*

“provincial synod, and national Assembly too; they need not appeal either from session or presbytery; their negative is sufficient; and thus presbyterian government, for redress, and a subordination of courts, is overthrown at once, and the majority of the people are the Supreme Court under Heaven.”

In the passage which I have read, the reasoning seems to be just and conclusive. The argument of the reverend author is here exactly in point, and it truly exhausts and is decisive of the present case.

I now proceed to the *fourth* question—Is this summons, so libelled and laid, as to justify its conclusions, and are those conclusions, as now restricted, such as we are entitled to enforce or to declare?

This is an action of declarator, an action having the widest range, and of the most useful nature. Whenever a man's patrimonial rights are invaded or threatened, he is entitled by such an action to seek redress or protection:—I say threatened, not as applicable to this case, where injury is actually done, but as obviating the defender's argument, that the patron can only bring his action, after another person than the presentee, is settled. This is at least a strange and not very favourable argument. It is inconsistent with the rule, that it is better to prevent, than to punish, or redress, wrong. But it is likewise quite inconsistent with our law. Bills of suspension are allowed not only on a charge given, but on a charge threatened they are equally competent; and the same rules hold as to actions of declarator.

But it is said that you cannot afford redress, and *therefore* you cannot give protection. You cannot order the presbytery to ordain, and *therefore* cannot find they have done wrong in refusing ordination or trial. The ordination belongs exclusively to the Church—which *alone* can ordain, and to which it belongs to ordain, or not to ordain, as it sees proper.

This argument comes oddly from the defenders. Your Lordships, say they, have no power to order ordination:—They spurn the idea. But while they deny this power to us, they have given a similar or greater power to heads of families; who, though they cannot *command*, can *forbid* ordination,—a power just as great as the other, and more odious. A presentee appears whom they, the presbytery, believe and *know* to be highly qualified and *fit* for the charge, and whom I therefore presume they anxiously wish to ordain. Such is their proper province and statutory power and duty. But they must not do so:—The Tribunitian *Veto* is interposed, by which their authority is annihilated, and they are thus prevented from exercising the salutary power vested

in them by the laws of God and man, and for the due exercise of which they are to those laws responsible.

But we are not asked to order ordination ; we are only asked to order examination and trial, which assuredly is within our competency. Take the corporation of surgeons. We cannot examine or pass a candidate for admission. But we can and would order them to take him on trial. Suppose that corporation, by a bye law, to declare that a majority of another corporation, say that of St Mary's Chapel, should by a veto incapacitate a candidate, and that they refused upon that ground to try a man who had duly served his apprenticeship, and gone through the curriculum, &c. would not you in such a case give redress ? We certainly should. If an action of declarator was brought by the rejected person, to have it found that the corporation had done wrong in refusing to take him on trial, we should certainly decern in his favour ; and if concluded for, decern them to take him on trial : Yet certainly we could not try him ourselves, any more than we can examine and ordain Mr Young.

On this point reference has been made by the defenders to the case of Gifford and Others v. Traill and Others, 8th July 1829. The case is well known to your Lordships. The action was a declarator at the instance of the Heritors of Zetland ; and its ultimate object was, to have it ascertained that they had right to vote in the county of Orkney. The first and principal conclusion of the summons was, to have it declared that Zetland was comprehended in and formed part of Orkney county ; that the whole islands of Orkney and Zetland formed only one county or stewartry, &c. Now nothing can be clearer than that this Court has no power to fix the boundaries of counties, as we were here required to do. But this was NOT the ground on which the declarator was dismissed. It was dismissed because the pursuers could *not* qualify any *patrimonial interest* in the case. If their patrimonial rights had been affected, injured, or threatened with injury, the action, I humbly think, must have been sustained, to the effect of affording them redress or protection.

Though not competent to adjudicate on county boundaries, we have done so *incidentally* to explicate our jurisdiction in patrimonial questions. Here the pursuers have manifestly a valuable patrimonial interest at stake, and therefore are entitled to call for our judgment. It humbly appears to me, that this case, by fair analogy, makes strongly against the defenders. When civil and patrimonial interests are at stake, we are bound to adjudicate ; and, to explicate our jurisdiction, to judge of rights to peerage, and of boundaries to counties—*incidentally*. So I hold we are bound to judge of ecclesiastical law, where we cannot *otherwise* explicate

our jurisdiction. In this case, therefore, we must judge of the point at issue, even if it were ecclesiastical, since without doing so, we must *deny* justice in a matter of civil right to the pusuers.

I shall now proceed to take notice of the cases. I shall go over them shortly, not because they are *unimportant*,—they are the *reverse*,—but because they are so well known to your Lordships, and have been so fully and ably commented on from the Bar.

Some cases, I must say of a strange nature, were mentioned by the Solicitor-General, from the records of the Assembly or commission, particularly that of Lochmaben in 1723. There it appears that the Crown presented. The people, or a majority of the people, concurred,—but, with the Lord Advocate's consent, the presentation was disregarded. This was injustice, at least to the presentee.

Other cases were mentioned by him about the same period; one in which the Earl of March was patron, and the Moderator *entreated* him not to insist in his presentation. This is certainly a very striking proof, by implication, that the patron's right was valid and acknowledged. For we may fairly infer, that the Moderator would not *entreat*, if the Court could adjudicate, or command.

It appears to me, that all those cases cited from the Assembly records, are, really, only of importance, as showing the bad effects of not giving, or rather of unwillingness to give, its full and fair effect to the act 1711, at that period when the people were excited, and the Church was in confusion. But I proceed to the cases in this Court.

The *first* is that of *Auchtermuchty*, (Moncrieff v. Maxton, 15th February 1735.) In that case the patron presented Mr Moncrieff to the living. A great deal of procedure took place in the church courts; but finally, the presbytery, in compliance with a judgment of the General Assembly, ordained and *settled* Mr Maxton upon a call in the face of the presentation.

The patron, on the ground that such a settlement was illegal, claimed the fruits of the benefice, and brought a bill of suspension against the party ordained and settled. This was resisted and opposed by him, on the ground that the Church's judgment was final, under the act 1567; and, therefore, that the patron had no remedy in the civil court, if the cause was given against him in the ecclesiastical court:—The very plea urged here.

Now look at the judgment. “The Court found that the right to the stipend is a civil right, and therefore, that the Court have power to cognosce and determine upon the legality of the ad-

“mission of ministers *ad hunc effectum*, whether the person admitted shall have a right to the stipend or not.”

The difference—the *only* difference—betwixt that case and this is, that, there, the minister was settled on the call in opposition to the presentee; *and here, the object is to protect parties against the evil, for which, there, the Court afforded redress.* This is the proper object, and one of the most important uses of a declarator.

The *second* case is that of *Dunse* (*Hay v. Presbytery of Dunse*, 25th Feb. 1749.) There, a declarator was brought against the *presbytery*—concluding that the patron had presented in due time, and that the presbytery had no right *jure devoluto*. This action was entertained, and decree given accordingly against the presbytery. The import of the judgment best appears from the petition against it quoted in the Dean’s speech, p. 310, which bears.

“May it therefore please your Lordships, in respect of the premises, to review the Lord Ordinary’s interlocutor, and to find, *Imo*, That no action is competent before your Lordships for reversing the judgments of a church judicature in the settlement of a minister in a vacant parish: And *2do*, To find that a declarator of a right of patronage against a presbytery or synod is not properly brought, and that the presbytery and synod are not proper defenders in such an action: And *3tio*, to find that the qualifications of a presentee to a vacant church are not the proper subject of a declarator before a civil court in Scotland; and *4to*, that it is not competent to your Lordships to grant an injunction to the church judicatories in Scotland, not to settle a minister in a vacant parish; and therefore to assoilzie the presbytery of Dunse from this present declarator.” And as this petition was *refused* by the Court, there must be a mistake in Lord Monboddo’s remarks on the case.

Here it is farther ascertained that the presbytery is the proper party in such an action.

The *third* case is that of *Culross*, (*Cochran v. Stodart*, 26th June 1751.) In it there were no competing patrons. But Cochran’s right to present was denied by the presbytery; and they settled Stodart. This led to a competition for stipend in which the patron was preferred. Here also the same points were again decided, (1.) That the Court has jurisdiction where civil right is involved. (2.) That the judgments of the Church Courts are not final under the act 1567.

The *fourth* case is that of *Lanark*, (*Dick v. Carmichael*, 29th July 1752.) Here there were two competing patrons,—the Crown and Lockhart,—who both presented. This led to a litigation, which lasted long, during which the presbytery proceeded and settled Lockhart’s presentee, Dick. But it was after-

wards found that the Crown was the true patron, and the stipend was therefore claimed by the Crown in preference to Dick, Lockhart's presentee and the minister settled by the presbytery. This was a very favourable case for Dick, and he was accordingly preferred both by the presbytery and this Court. This judgment, however, was reversed on appeal by the House of Lords, thus ascertaining the principle that the presentee of the true patron, and he alone, had right to stipend.

It was in this case, that Dick's counsel (President Craigie) stated, that if there had not been competing patrons, the settlement of Dick would have been a gross contempt of the laws of the land. And who can deny this on attending to the former cases of Auchtermuchty, Dunse, and Culross ?

The *fifth* case is that of *Forbes*, (Lady Forbes *v.* M'William, February 1762.) Here there were competing patrons—Lord Forbes and Lady Forbes. This Court found against Lady Forbes, but this judgment was reversed by the House of Lords. In the meantime the presbytery had settled Lord Forbes's presentee—but it was found that he had *no* right to the stipend, and it was given to Lady Forbes, the true patron, or her presentee—agreeably to the cases already mentioned, which were referred to, and thus confirmed,—“ It is a rule, that where there is any controversy about “ the right of patronage, the ecclesiastical courts must stop till it is “ determined,”—thus indicating the fixed and paramount right of the patron to grant a valid presentation.

The *sixth* case is that of Lord Dundas *v.* Presbytery of Shetland and Gray, 15th May 1795. This was truly stated to be a most important case. The facts of it are well known—too well. In it, the presbytery, on a call by the people, and after they knew that a presentation had been given to Nicholson, exercised the *jus devolutum*, and ordained and settled Gray. Lord Dundas did not go to the church courts, but at once brought a declarator against the presbytery and Gray, containing conclusions reductive of Gray's right, and alternatively the following declaratory conclusions.

“ Or, at least, that it ought and should be found and declared, “ that the pursuer, as undoubted patron of the said church and “ parish of Unst, had, and has the only right and title to present “ a minister thereto, in the room of the said Mr James Barclay, “ the late incumbent ; that he exercised his right as patron within “ the time required by law, and that the presentation granted by “ him in favour of the said Mr John Nicholson is valid and effective ; and was with the presentee's licence, certificate, and letter of acceptance, offered to the moderator of the presbytery, as “ is usual in such cases, within the time law requires ;—and, therefore, that the said defenders, the presbytery of Zetland, ought

“ and should be decerned and ordained, by decreet foresaid, to give due obedience to the said presentation, and to proceed in the settlement of the said Mr John Nicholson, with all convenient speed, according to the rules of the church ; and until the final and conclusion of the process to follow hereupon, and that the said Mr John Nicholson shall be settled in the said church and parish of Unst, it ought and should be found and declared, by decreet foresaid, that the pursuer, and the other heritors, liferenters, and others liable in stipend to the minister serving the cure of the said parish, are entitled to retain and withhold the stipend, whether payable in money or in kind, and to prevent the said Archibald Gray from taking possession of the manse, glebe, or other rights and privileges belonging to the minister of the said parish.”

This last conclusion could not be insisted in, as Gray was already settled. But decree passed in terms of the declaratory conclusions. Lord Dundas did not insist on the reductive conclusions; and had no occasion, for it was found that he had right to the stipend; and the *result* was, the settlement of Nicholson, whose name as minister of the parish appears, as I was told, in next year's almanack. Here all the redress was given that was asked for, or that the case required. The presentation was found to be valid and effectual, necessarily implying that the presentation and settlement by the presbytery were not valid and effectual.

In the present case matters are in a more favourable state for the pursuers. There is here no settled minister to eject. All that in substance is asked for, is to find that Mr Young's presentation is valid and effectual, if he shall be found qualified.

Lastly, we come to the two cases which lately occurred, relative to the settlement of a minister in the parish of *Kiltarlity*.

In the *first* (*Baillie v. Morison*, 28th February 1822,) two important points were decided. *First*, that it was *competent*, by suspension and interdict, to stop the presbytery from proceeding in the settlement. *Second*, that the parties, *i. e.* elders, heritors, and parishioners, had *no* title to object to the presentation or settlement. These are the very persons who here *forbid* the presbytery to proceed.

In the *second*, which was decided on the 10th June 1823, it was found that the presbytery was barred from objecting to a presentation, after having once sustained it. The *new mode* of *so far* sustaining had not then occurred to them. But the case is also of importance, as being a declarator at the instance of the presbytery. Yet it has been said that presbytery cannot be called as parties. Why—of the eight cases mentioned, the presbytery were parties in four, viz. those of Dunse, Zetland, and the two Kiltar-

lity cases. Who else *can* be called in any action than the party by whom wrong is done or threatened?

Here the presbytery has done wrong, *first*, in refusing to take on trial; and, *secondly*, in rejecting the presentee. Besides, it threatens farther wrong; and the wrong which it threatens is not matter of speculation or conjecture, but of certainty; for in pursuance of what they have done, and in consistency with it, they must proceed to exercise the *jus devolutum*. If they were not to do so, it would be a complete admission that what they had already done was wrong; that the *Veto Act* was not binding on them; and that they were to disobey it. It is against this future proceeding that the pursuers ask for protection; and we are bound, I think, to afford it to them.

Recurring to the decisions, I think they establish all the points maintained by the pursuers. It is *most true* that none of those decisions is *precisely* in point. There *was* no *Veto Act*, and they cannot relate to a nonentity. Indeed, so far as relates to this act, no similar or analogous case can possibly, I believe, be found. You will in vain search the records of all judicatories, civil and ecclesiastical, and of all the legislative bodies existing, no such act, giving an uncontrollable and *arbitrary* Veto, will be found in any of them.

But setting this aside, the decisions establish every point. 1. That the proper parties are here called; 2. That in questions relating to matters ecclesiastical, this Court has jurisdiction to assert and protect civil rights; 3. That those very rights which the pursuers are here vindicating, which rights have already been invaded, and are threatened with further invasion, are just those rights for the assertion and protection of which, your Lordships have in all the cases mentioned, exercised your jurisdiction.

I am therefore for repelling the defences. Judges, in administering law, have no discretion. In the discharge of this sacred duty we are not to be intimidated or influenced by acts of Assembly, or by resolutions of either House of Parliament. The first duty to which our oaths binds us, is to administer the law of the land; and from this duty nothing can hinder or deter us, but an *Act of Parliament*,—an act by which the law itself is changed.

I am bound to come to this conclusion, but I should come to it with much regret, if I thought that it could be hurtful to the Church of Scotland. I had the honour, for a considerable period, of a seat in the General Assembly, though for several years, I have ceased to be a member of it; and I am still a sincere friend to the Church, and nearly connected with it. My grandfather was a minister of the Church of Scotland; one of his sons after him was also a clergyman, distinguished by his piety, his

learning, and his usefulness :—I am proud of such connexions, —they serve to attach me, in every way, and by every tie, to the National Church, of which I have always been a member. As a sincere well-wisher of the Church, I repeat, that I should deeply regret any judgment that might be hurtful to it ; but I console myself, by taking an opposite view of the effects which will be produced, if our judgment should be in favour of the pursuers.

Here I intended to read, but in this I have been anticipated by your Lordship, the concluding passage of Sir Henry Moncreiff's excellent pamphlet, where he states, that the practical effect of the Church Establishment in Scotland, on the information, the morals, and religious character of the people, equals, if it does not surpass, whatever can be imputed, on the same points, to any other church in the world.

This, was well, and truly said :—It was true at the time ;—it is true still ;—and, long may it continue to be so. The Church of Scotland, is a beautiful and solid fabric :—It rests on durable—on eternal foundations : It has nobly fulfilled, and continues to fulfil, the important purposes for which it was intended ; and I, for one, am unwilling to tamper with so fair, and useful an edifice.

Wednesday, February 28.

THE LORD PRESIDENT.—“ LORD JUSTICE-CLERK.”

THE LORD JUSTICE-CLERK.—My Lord President, in explaining the grounds of the opinion which I am about to deliver in this important case, I must begin with stating, that I can yield to no one in a sincere and ardent regard for the welfare and interests of the Church of Scotland, of which I am, and have always been a member, and in the General Assembly of which, I had the honour to hold a seat as an elder for the long period of forty-one years. I must not, however, disguise from your Lordships, that having in that capacity taken a part from the beginning in these discussions in the General Assembly, that ultimately led to the Act of 1834, I was called upon to form, and did form according to the best of my ability, a decided opinion upon the question which was then determined by the Assembly,—that I gave my voice against that enactment,—and that I also dissented, with many others of the minority, from the passing of that Act. I went, however, no farther than to warn the Assembly of the risk that might be incurred, of the Church being brought into collision with the law of the land; and foreseeing the possibility of civil suits being afterwards instituted, I purposely abstained from concurring in the separate Reasons of Dissent, which, on the special ground of the illegality of the act of the Assembly, in a civil point of view, were entered upon the record, by a learned person well known to your Lordships: That which I anticipated having taken place, by the institution of the present action, I came to the discussion of the important question of civil right raised by it, prepared to listen with attention to every thing that could be urged on either side. But should the decision of this question prove in any way detrimental to the interests of the Church of Scotland, I have the satisfaction of knowing, that it can in no degree be ascribable to the large minority of the Church, who were upon principle opposed to the uttermost to that act of the General Assembly 1834, from which alone the present litigation has originated.

Keeping in view the facts as appearing on the record, and the proceedings of the presbytery of Auchterarder, in reference to the presentation by the Earl of Kinnoull, the undoubted patron of that parish, in favour of Mr. Robert Young, a regular licentiate of the Church of Scotland, and apparently possessed of the re-

quisite qualifications, who accepted the presentation, and was ready to submit himself to trial and examination by the presbytery, according to the inveterate practice of the Church,—that the presbytery so far sustained the presentation as to appoint a day for moderating in a call, the presentee being as usual authorized to preach,—and that though the call was afterwards signed by three individuals, the presbytery following out the enactment and regulations of the interim act of Assembly of 1834, after having ascertained that a majority of male heads of families of the congregation in full communion with the Church had, but without assigning any reasons, dissented, did, without any examination of his qualifications, reject the presentee accordingly, while a motion for finding the call *insufficient* had previously been rejected by the presbytery,—the question raised by the present summons at the instance of the patron and presentee, and in which the presbytery of Auchterarder are called as defenders, is, whether the above rejection, under the circumstances in which it took place, was or was not a violation of the legal rights of both of the pursuers, and which they are entitled to have declared by this action.

The defence maintained on behalf of the reverend presbytery is rested upon the ground of their proceedings in the moderation of the call to the parish of Auchterarder having taken place, in strict conformity with the interim act and regulations passed by the General Assembly of 1834, and since sanctioned by presbyteries, in terms of the barrier act, and become the law of the Church; and therefore, that this Court, whatever power it has to decide in any question of purely civil right, has no jurisdiction in the matter embraced in the declaratory conclusions of the present summons, which is one entirely of an ecclesiastical nature.

In determining this question, we are of necessity compelled to decide upon matters of a very delicate and important nature, as our opinions must in fact be given, not only as to whether the civil rights of the pursuers have been violated by the proceedings complained of, but whether the act and regulations of the General Assembly of 1834 were or were not contrary to its own constitution, *ultra vires* of the Church, and contrary to the law of the land.

The discussion which has taken place with so much ability on both sides of the bar, has opened up a most extensive field for observation, and I am much afraid, that it will be necessary to trespass for a considerable time on your Lordship's attention, in stating the opinion, which in justice to the parties, and the importance of the case itself, I have formed in regard to it.

Whatever views may originally have been entertained by the early reformers of our church, in regard to the exercise of the

right of lay patronage, as indicated by the language of the First Book of Discipline, they do not appear to me to be material to the decision of the present question, as that book never was adopted as the law of the Church itself; and we know that the subject of patronage was afterwards adjusted in a totally different manner. Previous to the passing of the act, 1567, c. 7, we learn historically, that unreasonable and extravagant views had been entertained, both by patrons and by the Church, as to the exercise of the right of patronage, and that various proceedings had taken place between the crown and the reformed clergy, with the view to a final arrangement; and we have the authority of Petrie in his history, as to the views expressed by the General Assembly, with regard to the accuracy of which no doubt can be entertained, as they came afterwards, in fact, to be embodied in that statute. He informs us that, in reply to certain articles sent by the Queen, the General Assembly of 1565, made the following declaration:—"Our mind is not that her Majesty, "or any other patron of the realm, should be defrauded of their "just patronage; but we mean, that whensoever her Majesty, "or any other patron, do present any person to a benefice, that "the person presented should be tried and examined by the "judgment of learned men of the Kirk, such as presently are "the superintendents appointed thereto, and as the *presentation* "to benefices pertains to patrons, so ought the *collation* thereof, "by law and reason, to the Kirk, of which collation the kirk "should not be defrauded more than the patrons of their presentation; for, otherwise, if it shall be leasome to the patrons absolutely to present whomsoever they please, without trial or examination, what then can abide in the Kirk of God but mere "ignorance without all order." Now, on adverting to the statute 1567, c. 7, which was passed two years after, it will be found to enact as the law of the land, what the Church had itself thus expressly declared that it desired, the legislature having, in the immediately preceding chapter, first placed upon a solid foundation the establishment of the true Kirk itself. The words used in this act, which I need not read at full length, are most emphatic and important; for, while the act declares, that the presentation of laick patronages is always reserved to the just and ancient patrons, it further declares, "that the examination and admission of ministers within this realm be only "in the power of the Kirk, now openly and publicly professed "within the same." No language can more unequivocally express, that it is with the Church alone, that the examination and admission which had before been expressed by the term *collation*, shall rest; while it is further provided, that the patron shall, within six months, (after the vacancy shall come to his know-

ledge), present a *qualified person* to the superintendent where the benefice lies, or others having commission from the Kirk, or otherwise the Kirk is to have the power "*to dispone the same,*" " (that is, to present in its own right) *to ane qualified person* for "that time." It is no doubt perfectly true, that this act also provides, that on refusal of the superintendent or commission of the Kirk, to receive and admit the person presented by him, it shall be lawful to the patron to appeal to the superintendent and ministers of the province, and finally to the General Assembly of the hail realm, "by whom the cause being decided, shall take "end as they decern and declare;" but still the whole proceeding of receiving and admitting, is confined to the Church, and to the Church alone, without there being the slightest indication of a right of interference in any other quarter whatever.

I shall not stop to notice any of the intervening statutes, but proceed to those passed in 1592, establishing the Presbyterian form of Church Government, and placing, on a clear and definitive basis, the rights of patrons, and the duty of the Church as to collation.

Your Lordships are fully aware, that previous to the passing of those Acts, much discussion had taken place between those acting for the Crown, and the leaders of the Reformed Church; and a great deal has been said in the course of the present argument, with regard to their proceedings, as noticed by Spottiswood and other authorities. It does not, however, appear to me, that any weight can with propriety be attached to the notes of Spottiswood, as to what points had or had not been agreed to in the conferences that are said to have preceded the Act of Parliament; as we can with propriety look only to the terms of the Acts themselves. It may, however, be observed, that Dr. Cook, in his History of the Church of Scotland, (Vol. i. p. 467) thus notices the act of 1592:—"Parliament met on the 5th of June, and "immediately entered upon the interesting subject of ecclesiastical "arrangement. The petitions of the Church were laid before it, "and an act was soon framed, establishing the Presbyterian form "of Church Government, as administered by General Assemblies, Synods, Presbyteries, and Sessions, defining the powers "of those judicatories, reversing all acts inconsistent with this "polity, and conveying to Presbyteries the right of receiving "presentations." Now, whether, in the petitions of the church, which are here said to have been laid before the Parliament, express reference had or had not been made to the 2d Book of Discipline, which had been agreed upon in the Assembly, 1578, and inserted in its registers in 1581; certain it is, that when the terms of its various chapters, with regard to the calling and election of ministers, are compared with those of the two chapters

of the act 1592, there cannot be a doubt, that the legislature had altogether departed from, and refused to sanction many of the proposals contained in that book, having granted, as the constitution of the newly established church, only what is provided in those acts. I need only refer, in particular, to the 4th and 5th articles of the 3d chapter of the 2d Book of Discipline. After treating of the extraordinary calling, the 4th article proceeds in these words :—" This ordinar and outward calling has " twa parts, election and ordination. Election is the chusing out " of a person or persons maist able to the office that vaikes, by " the judgment of the elderschip and consent of the congrega- " tion to whom the person or person beis appointed. The qua- " lities in general requisite in all them wha sould beir charge in " the kirk, consist in soundness of religion and godliness of lyfe, " according as they ar sufficiently set furth in the word." And the 5th article is in these terms :—" In this ordinar election, it is " to be eschewit, that na person be intrusit in any of the offices " of the kirk, contrar to the will of the congregation to whom they " ar appointed, or without the voice of the eldership. Nane aught " to be intrusit or placit in the places alreadie plantit, or in any " rounge that vaikes not, for any wardlie respect : and that quhilk " is called the benefices, aught to be nothing else but the stipend " of the ministers that ar lawfullie callit."

Such then are the contents of the Second Book of Discipline upon this point, but how totally different the enactments of the legislature in regard to them truly are, is seen from attending to the terms of the two chapters of the act 1592, which may in fact be considered as composing one enactment. No such mode of appointing to vacant benefices as had been indicated in the above chapters is there conceded, neither is there any provision against the intrusion declared against in the Book of Discipline, whatever its meaning may be held to be ; nor was the proposition, that what is called the benefice " ought to be nothing else but " the stipend of the ministers that are lawfully called," enacted by the legislature. It is, however, most important to observe, that the first chapter of the act 1592 ratifies and approves every thing that had been agreed upon by his Majesty with certain of the ministers, in regard to the general polity, and the government, jurisdiction and discipline of the church, the tenor of the very articles of which is set forth in the act itself. While this is so provided for, and the power of election, and every thing connected with it, which had been set forth by the church, are altogether left out, nothing can be more irresistible, than this proof of the difference between the act of the legislature and the Second Book of Discipline. Had the demands therein made not been held as directly excluded by the act of the legislature, presbyteries which are admitted to be designated by the term *eldership*,

ought to have been all along in the full exercise of the right of election, but which it is well known never was the case.

The 116th chapter of the act, while annulling certain previous statutes, and declaring as to the effect of others, expressly provides, that the act 1580 shall not derogate from the privileges of the office-bearers of the kirk, with regard to the deprivation or collation of ministers, and concludes with ordaining "all presentations to benefices to be direct to the particular presbyteries in all time coming, with full power to give collation thereupon, and to put order to all matters and causes ecclesiastical within their bounds according to the discipline of the kirk; *providing the foresaids presbyteries be bound and astricted to receive and admit whatsoever qualified minister presented by his Majesty or laick patrons.*" Here then it is explicitly declared, that all presentations to benefices shall be directed in all time coming to presbyteries, instead of the superintendents, while the full power of collation is again conferred solely upon the new judicatories; but, at the same time, in order to prevent all evasion of duty upon their part, and fully to secure the rights of patrons, it is expressly provided, that the "foresaid presbyteries be bound and astricted to receive and admit whatsoever qualified minister presented by his Majesty or laick patrons." The qualifications of ministers are set forth in the Book of Discipline, and therefore it was unnecessary to define in this act what was so thoroughly known to the church, in which the power of giving collation had been thus unequivocally confirmed. In order, however, to remove all doubts as to the personal qualifications of a presentee, an act was passed by the General Assembly in 1596, the terms of which are quoted in the pleadings of the pursuers, and which were afterwards confirmed by the Assembly of 1638. But amongst those enumerated, it will not here be found, that the presentee, as a necessary qualification, must be acceptable to the whole or a majority of the congregation.

In the act 1592, c. 117, in making provision for the right of presentation being devolved upon presbyteries, in the event of the patron not presenting a qualified person after a vacancy declared by the church, it is enacted, that the presbytery may dispoise the same, and give collation thereof to such qualified person as they shall think expedient; "providing always, in case the presbytery refuses to admit any qualified minister presented to them by the patron, *it shall be lawful to the patron to retain the hail fruits of the said benefice in his own hands*"—a pretty effectual security against the violation of his right.

Such then being the enactments as to the exercise of the rights of patrons, of those statutes, which ratified and confirmed the presbyterian church establishment, and in fact made them part and parcel of it, it is unnecessary to advert particularly to the

proceedings which took place in the beginning of the 17th century upon the restoration of bishops. The act 1612, c. 1. establishing episcopacy for the time, repealed the act 1592, c. 116, and at the sametime provided, that in the event of a bishop refusing to admit a qualified presentee, letters of horning might be issued, directing the Ordinary to admit such person as the patron had presented. It is no doubt true, that such form of diligence has not by statute expressly been authorized against presbyteries; yet as the right of presentation was afterwards restored to patrons, the former acts came again into operation; and, according to Mr. Erskine, (B. 1. tit. 5. § 16.) “of course “all the consequential rights, and among others that of retaining “the stipend.”

In 1645, after episcopacy had been done away, measures were adopted, with the view of giving effect to the notions that were then entertained throughout the whole of Great Britain, in relation to persons properly qualified for the Ministry. Accordingly, an act was passed by the General Assembly, the preamble of which is set forth in the pleadings for the pursuers; which, besides the various enactments which it contains, specially provided, with regard to the doctrine of ordination, that “he who is “to be ordained Minister, is to be examined and approved by those “by whom he is to be ordained. No man is to be ordained a “minister for a particular congregation, if they of that congrega- “tion *can shew just cause of exception against him.*” In the Directory which is afterwards given for the ordination of ministers, there is this provision, “that there shall be sent from the “presbytery to the congregation a public intimation in writing, “which shall be publicly read before the people, and afterwards “affixed to the church door, to signify, that on such a day a “competent number of the members of that congregation nominated by themselves, shall appear before the presbytery to give “their consent or approbation to such a man to be their minister, “or otherwise to put in with all Christian discretion and meek- “ness what exceptions they have against him; and if, upon the “day appointed, there be no just exception, but the people give “their consent, then the presbytery shall proceed to ordina- “tion.” There is thus unequivocal evidence, that, at this period of the Church, which is represented as one of the purest in its history, the members of the congregation objecting to the ordination of a minister, were bound to shew just cause of exception against him, and were not supposed to possess any arbitrary right of *veto* or objection whatever, thus proving clearly what was the understanding of the leaders of the Church at that period as to the true rights of the people.

In 1649, after the dissolution of the monarchy, and which can-

not be asserted as the best period of our history, an act of the Convention of Estates was passed, abolishing patronage in Scotland; while, in lieu of it, it was enacted; "That whosoever hereafter shall upon suit and calling of the congregation, after due examination of their literature and conversation, be admitted by the presbytery into the exercise and function of the ministry, in any parish within the kingdom, the said person or persons without a presentation, by virtue of their admission hath sufficient right and title." Even then, however, it does not seem to have been the intention of that usurping Convention of Estates, extravagant as the views of the day were, both as to political and ecclesiastical matters, to confer the privilege of nomination upon the people at large; for the same act has this further provision: "Because it is needful that the just and proper interest of congregations and presbyteries in providing of kirks with ministers be clearly determined by the General Assembly, and what is to be accounted the congregation having that interest; therefore, it is hereby seriously recommended unto the next General Assembly clearly to determine the same, and to condescend upon a certain standing way for being a settled rule therein for all time coming."

In pursuance of this recommendation, the General Assembly proceeded to prepare the Directory that is quoted at full length in the pleadings for the pursuers, in which, after providing for the election of a pastor by the session, there follow the provisions, upon which so much reliance has been placed in support of the act of Assembly 1834, in these words: "3. But if it happen that the major part of the congregation dissent from the person agreed upon by the session, in that case the *matter shall* be brought unto the presbytery, who shall judge of the same. And if they do not find their dissent to be grounded upon causeless prejudices, they are to appoint a new election in manner above specified. 4. But if a lesser part of the session or congregation shew their dissent from the election, without exceptions relevant and verified to the presbytery, notwithstanding thereof, the presbytery shall go on to the trials and ordination of the person elected; yet all possible diligence and tenderness must be used, to bring all persons to an harmonious agreement." In regard to this Directory, which had been prepared in reference solely to the above act of the Convention of Estates, which had abolished patronage and introduced an entirely new law, as to the election of ministers, it will be observed, that that statute was totally rescinded at the restoration, and consequently the Directory became nugatory and inoperative, by the rights of patrons having been restored to their former condition. To hold that this Directory, nevertheless,

continued as the recognized law of the Church, seems altogether unwarrantable, as it certainly had been passed entirely in reference to that alteration of the law with regard to patronage, which at the restoration was wholly done away.

But even viewing it as a document still standing upon the records of the church, and as containing the views of its framers, the question has been raised as to what its true import is. An attempt has indeed been made to maintain, that it admits of only one meaning, namely, that it granted to a majority of the congregation of every parish a right to exclude entirely the power of the church to inquire into and judge of the qualifications of all persons nominated to benefices, and to give or refuse induction accordingly. But upon a fair consideration of the whole of this passage of that Directory, it appears to me, that its terms necessarily lead to no such construction, but that it does on the contrary merely reassert the ancient and undoubted right exclusively belonging to the church itself, to inquire into and decide upon all objections to the qualifications of the nominee. It does certainly, however, distinguish between the dissent of the majority and that of the minority of the congregation, but to the effect only, that if the former dissent from the person agreed upon by the session, in that case "*the matter* shall be brought into the presbytery, "who shall judge of *the same*, and if they do not find their dissent to be grounded on causeless prejudices," they are to appoint a new election; while, if the *latter*, shew their dissent from the election, "without exceptions relevant *and verified to the "presbytery,*" notwithstanding thereof the presbytery shall go on to the trials and ordination of the person elected. The meaning of this seems sufficiently plain, that the dissent of the majority shall at once be a ground for the presbytery *sisting* further proceedings until the matter of that dissent is brought before and judged of by the presbytery. But unless a minority shall immediately not only *state* but *verify* relevant objections, their dissent is not to stop the presbytery, even for a moment, from proceeding with the trials and ordination. It is quite clear, that even as to the majority dissenting, *the matter*, that is, the dissent and the grounds of it, is to be brought before the presbytery, *who shall judge of the same*; and if, after so judging of it, they do not find their dissent to be grounded on causeless prejudices, which can only be done by investigating the reasons of dissent, then only is a new election to take place, shewing clearly that it is the presbytery who are to judge of the validity of the grounds of dissent. If the mere dissent of the majority was *per se* to render a new election necessary, how is it possible that it should be provided that the *matter* should be brought to and judged of by the pres-

bytery. It is perhaps indeed altogether superfluous to have said so much upon the construction of this part of the *Directory*, considering that your Lordships know well that so high an authority as Sir Henry Moncreiff has unequivocally declared that he understood it exactly in the same way, and that neither the majority nor the minority of the congregation were ever allowed to interpose an arbitrary dissent without assigning reasons, of the validity of which the presbytery were to judge.

The rights of patrons and of the church were not again regulated by Parliament till 1690, in which year two important acts were passed. It is unnecessary to notice particularly the act of that year, c. 5. ratifying the Confession of Faith, and settling the presbyterian church government, the preamble and terms of which were referred to by the bar, further than to observe, that it specially revives and confirms the act 1592, c. 116, in its whole heads, "except that part of it relating to patronages, which is *hereafter* to be taken into consideration." The reason of this exception is made plain from the subsequent statute of the same year, c. 23, which, after proceeding to make void the power formerly exercised by patrons of presenting to vacant churches, contains the following enactment: "And to the effect the calling and entering ministers in all time coming may be orderly and regularly performed, their Majesties, with consent of the estates of Parliament, do statute and declare, That in case of the vacancy of any particular church, and for supplying the same with a minister, the heritors of the said parish (being Protestants) and the elders are to name and propose the person to the whole congregation, *to be either approven or disapproven by them*; and if they disapprove, that the disapprovers give in their reasons, to the effect the affair may be cognosced upon by the presbytery of the bounds, at whose judgment, and by whose determination the calling and entry of a particular minister is to be ordered and concluded. And it is hereby enacted, that if application be not made by the eldership and heritors of the parish to the presbytery for the call and choice of a minister within the space of six months after the vacancy, that then the presbytery may proceed to provide the said parish, and plant a minister in the church *tanquam jure devoluto*."

Here, then, we have a new enactment in regard to what is termed the calling and entering ministers; and in the subsequent passage *the call and choice of a minister* are the words used in providing for the exercise by the presbytery of the *jus devolutum*, language which may be considered as explanatory of the use of the term *call*, as a step in completing the act of collation. But what it is most important to observe with regard to this statute

is, what it particularly enacts, as to the rights of the congregation. At a time when it had been felt, as the preamble bears, "that the power of presenting ministers to vacant churches of late exercised by patrons hath been greatly abused," and when the nomination to vacant benefices was, for the correction of that evil, taken away from the former patrons, and put on a totally different footing, it was surely to be expected, that if it was then held as truly any part of the law of the church that any such right belonged to the congregation as is supposed to have been recognised, either by the Directory 1649, or by the past usage of the church, some recognition or notice of it would have entered this important statute. But so far from this being the case, it is expressly declared, that while the new parties who are to supply the place of the former Patrons, are to propose the person to the whole congregation, to be either approved or *disapproved by them*, "if they disapprove, that the disapprovers give in their reasons to the effect, the affair may be cognosced upon by the presbytery of the bounds, at whose judgment and by whose determination, the calling and entry of a particular minister is to be ordered and concluded."—Not the slightest indication is here to be found of any right of *veto* or dissent without reasons, existing either in a part or the whole of a congregation; but if they do dissent or disapprove, they must give in their *reasons*, of which the presbytery is to judge, and of course subject to the review of their own ecclesiastical superiors; a provision which is in perfect consistency with the whole stream of authority derived from the statutes of the realm, as well as the acts and uniform usage of the church itself. Although, therefore, it is quite true, that this act was afterwards repealed, when the right of patronage was restored, it is nevertheless a most important element in the inquiry in which we are now engaged, as to what the law of the church and the rights of the people were on all hands truly held to be at its date.

The 10th of Queen Anne, c. 12, was afterwards passed, repealing the act 1690, c. 23, and by which it is declared that the rights of patrons are "restored and settled and confirmed to them, the aforesaid acts or any other act, statute, or custom to the contrary in anywise notwithstanding;" And after providing that her majesty or other patrons may from and after the date of the act, present a *qualified minister or ministers*, this statute further enacts, that "the presbytery of the respective bounds shall, and *is hereby obliged* to receive and admit in the same manner such qualified person or persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers presented before the making of this act ought to have been admitted."

Now, as to the argument rested on this act not having expressly revived the astringing clause with regard to presbyteries, contained in the act 1592, which had not been revived by the act 1690, in regard to patronages for the reason already noticed, it is rather a singular position. The act itself does not expressly declare, that that part of the act 1592 is not revived, and it is only inferred from its silence, that it is not so. But surely when this act expressly restored, settled, and confirmed to patrons the full possession of those rights which had been abolished by the act 1690, it must be held to have again brought into operation the whole laws that formerly existed for their maintenance and security, as at the very moment that it restored patronage, it could not possibly have meant to withhold the enactments under which that right had formerly been exercised.

But when the words of this very act are attended to, they will be found to be of themselves as stringent as those of the act 1592 itself. For what can be a more clear or imperative declaration than is contained in the provision that “the presbytery of the respective bounds shall, and is hereby obliged to receive and admit in the same manner such qualified person or persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers presented before the making of this act ought to have been admitted.” These words clearly *impose a duty*, which it is incumbent upon the presbyteries to perform, and the performance of which they can unquestionably in no way legally evade.

Accordingly, Lord Bankton, in *adverting* to the duty of presbyteries with regard to the admission of ministers, expresses himself in these words.—“The manner mentioned in the British Statute, must be that which took place formerly, when patrons had the right of presentation, they being restored to their ancient right; and if it were otherwise, the presbytery would have it in their power to set aside the presentation, upon suggestions from the people, which was not intended; nor did such method take place when the patrons presented, in the purest times of presbytery.” B. 2, tit. 8, § 68.

The only other statute which it is necessary to advert to, is that of the 5th Geo. I. c. 29. An excerpt from which is contained in the prints now before us. The 8th section makes provision for the persons presented to any vacancy being duly qualified, by taking the oaths declared by law, and formally accepting of the presentation, otherwise the presentation shall not be held an interruption of the course of time allowed to the patron, and that the *jus devolutum* shall take place—and the 9th section contains this declaration and enactment, “That nothing herein contained shall prejudice or diminish the right of the church as the same now

“ stands by law established, as to the trying of the qualities of any person presented to any church or benefice.”

Here we have another statutory recognition of the sole right of the church, to decide upon the qualification of every presentee, and which the church continued to act upon till 1834.

Such then are the enactments in our Statute Book in regard both to the constitution of the church itself, and the rights of patrons to present to vacant benefices, which constitutes, in fact, that ecclesiastical establishment of Scotland, which the sovereigns of these realms at their succession regularly swear to maintain and defend.

It is unnecessary to dwell upon the varied practice of the church in regard to the settlement of ministers subsequent to the date of the act restoring patronage. That practice is fully and sufficiently explained in the valuable work of Sir Henry Moncreiff, to which so much reference has been made, in the course of the argument upon both sides. The effects of the alteration of the law were for sometime little felt, in consequence of the manner in which patrons exercised their rights, or rather acquiesced in the interference of the church-courts. Disputed settlements, however, afterwards occurred, when patronage came to be complained of as a grievance, which excited great heats and animosities throughout the judicatures of the church; and with the view of allaying them and soothing the people, the act of the Assembly 1736 was passed by a predominant party at the time, which has been much relied on as an authority for the interim act of the General Assembly of 1834. I shall not, however, detain your Lordships with referring to what is so distinctly stated in the work to which I have just alluded, as to the import of that act of Assembly, or the little effect that was either intended by it, or derived from it; it never having in fact been acted upon, while questions of disputed settlements were continued to be decided by the General Assembly, according to the views of the prevailing party in the Church, and which are admitted to have been for a long time directly against requiring a full assent by the Call. Whether all of those cases, and particularly that of *Currie*, and others, that might be mentioned, were or were not decided according to the rules of the Church, may no doubt be matter of dispute; but the inherent right of the Church itself, unfettered by any other body whatever, to determine every thing with regard to the qualifications and fitness of its members, never was doubted, nor was it ever supposed, that any other body held a co-ordinate right of judging in such matters.

Following out the practice in the exercise of its right of *collation*, secured to it by the statutes of the land, the Church has no doubt, for a long period of time, adopted the use of a written call

or invitation to a presentee, in the form that is before us, as a necessary proceeding in the act of collation ; and accordingly the act of the General Assembly 1782, recognises the call as an established part of the procedure ; but whether that document ought to have a greater or a lesser number of signatures attached to it, as an indication of consent, has always been deemed a matter fit only for the cognizance and decision of the Church itself. Many questions no doubt have arisen, in which the sufficiency of a call has been brought in issue, but such questions were dealt with and disposed of, according to the laws of the Church ; and when these questions came to be connected with the qualifications and fitness of the presentee to the particular charge to which he had been presented, presbyteries, in the first instance, and the other judicatories, in the event of an appeal, uniformly judged of and determined upon all such objections.

In this situation of matters, and at a time when there were comparatively very few disputed settlements throughout the Church, when nothing like any general complaint existed as to the mode of exercise of the rights of Patrons, the General Assembly thought proper, by a majority, to pass the interim act and regulations since sanctioned by presbyteries, and now founded on by the Presbytery of Auchterarder, in defence against the present action of declarator. The terms of this “overture and interim Act on Calls,” as it is denominated, with the accompanying regulations for carrying it into effect, and which are embodied in another act, and in truth form one enactment, are quite familiar to your Lordships ; and the question to be determined is, whether they do or do not amount to a direct encroachment upon civil right and whether they were not *ultra vires* of the Church, contrary to its constitution, and a violation of the positive law of the land.

This act and its regulations in regard both to their effects upon the rights of Patron and presentee, and their own legality, must be viewed as a whole, and whatever objection is discoverable upon the face of them, must, in my humble opinion, be available in the present argument. That the right of the patron, as well as that of the presentee, is most materially affected by that act and regulations, appears to be beyond all controversy. According to the established statutory law of the land, it has been seen, that, a patron has the right to present to a vacant parish a qualified person, and the presbytery is astricted or obliged, to receive and admit him accordingly ; the right of *collation*, by examining and judging of the whole qualifications of the person presented, resting, however, exclusively with the presbytery and superior judicatories. The power of thus selecting and presenting a qualified person, is that which a patron can secure and make effectual, if

he acts rightly, and when so acting, he is by law entitled to call upon a presbytery to perform its legal functions. But what is it that is done by the act and regulations now under consideration? A direct bar is thereby interposed between the exercise of the right of nomination by the patron, and the performance of the legal duty of the presbytery, by its being declared, that as soon as it shall be ascertained in proceeding in the moderation of a call, the preparatory step of collation, that a majority of the male heads of families of the congregation or communion disapprove of, or dissent from, the person presented to the vacancy, *that shall*, without any reason being assigned, and without the presbytery having taken a single step in the examination of the qualifications of the individual presented, be held a sufficient ground *for his immediate rejection, as well as that of the presentation.* The matter, however, does not rest even here, for the sixteenth regulation provides, that “if no presentation shall be given within the limited “time to a person, from whose settlement a majority on the roll “do not dissent, the presbytery shall then present *jure devoluto.*” Can it then be denied that the above enactments, in conferring in plain terms upon this majority a direct power of *veto* on the exercise of the undoubted right of the patron, and *jus quæsitum* of his presentee, is a manifest encroachment on their civil rights? while that of the patron is at the sametime in reality declared to be forfeited by the fiat of the Church itself. Against the operation of this right of *veto*, no step to secure himself can be taken either by the patron or presentee. The want of every qualification required by the laws of the Church can be guarded and secured against by the patron, but escape from the effect of this right of *veto*, can in no way be accomplished, as it may be exercised, and we are told has been exercised by a majority merely of one, against the most meritorious and best qualified man in the Church. The whole matter depends entirely upon the fancy, caprice, or aversion to patronage of that majority, over which, (obtained, as it may be by cabal or intrigue,) no control whatever can be exercised, further than what may be supposed to be derived from the declaration which it is provided may be demanded from a dissenter, that “he is actuated by no factious or malicious motive, “but solely by a conscientious regard to the spiritual interests of “himself or the congregation;” as if, after a violent and acrimonious opposition in a parish, such declaration could not without difficulty be obtained in every case.

So long, however, as the right of patronage stands upon the foundation of the 10th Queen Anne, and the other statutes that have been referred to, it cannot by possibility be denied, that it is most materially trenched upon, and in a great measure rendered nugatory, by the act and regulations of 1834. Prior to this

enactment, a patron having presented to a presbytery a qualified person, such as a regular licentiate or an established minister of the church, was by law entitled to rely upon his collation being proceeded in according to the rules of the church, which rules rendered it imperative upon the presbytery, after sustaining the presentation, if liable to no objection, to proceed to the moderation of a call,—to examine the presentee as to his qualifications, and if there appeared no solid objections or reasons against him,—to ordain him to the benefice. This course of procedure, however, is wholly departed from by the interjection of the *veto*, or dissent of the majority of the congregation, and holding it of itself to be an insuperable bar to the further progress of collation, and a ground for immediate rejection of the presentee. That such a power of *veto* as is conferred upon the majority of the congregation by this act, never can without the most manifest sophistry be viewed as a mere matter of qualification, which the church may establish or regulate, is plain on its very face. For how can a patron be said freely to exercise the right expressly conferred upon him by statute, of presenting a qualified person whom the presbytery is astricted to receive and admit, when he is trammelled at the very first by a third party, being invested with the right of at once rejecting the person presented, by the mere exercise of a *veto* or dissent, without any examination having taken place as to his qualifications? What has been done by this enactment is no more like the establishment of a new *item* of qualification, than if the act had declared that it should be an instant ground of rejection of a presentation, that besides being signed by the lawful patron it did not also bear to be countersigned by a majority of the heads of families of the congregation. If such an enactment would have amounted merely to an additional qualification, and to which a patron was not entitled to object, as any invasion of his rights, then, but not till then, can it be said that the conferring the right of *veto* in question is only an addition to the category of qualifications required by the church in a presentee, and which cannot be complained of in a court of law.

Holding it, however, as manifest, that the enactments of the General Assembly of 1834 did materially alter and encroach upon the rights of the pursuers of this action, it remains to be considered whether they were not also, in violation of the constitution, and *ultra vires* of the church itself. This inquiry we are compelled to enter upon, in consequence of the defenders having maintained that these enactments relate to a matter purely ecclesiastical; that they are within the legislative power of the church and fully sanctioned by its constitution; and that, therefore, this court has no jurisdiction in regard to the matters embraced in the present summons.

I have already had occasion to observe that by the statutory law of Scotland the right of collation to vacant benefices was recognised as the sole privilege of the church from the earliest period of its history, that it had been confirmed by a variety of acts of the legislature which, at the sametime, expressly provided for the security of the rights of patrons when presenting persons duly qualified, and that it had uniformly been asserted by the church under all its succeeding changes, as its inalienable right. This right of collation, it is known, included in it the exclusive power of examining into and judging of the qualifications of all persons presented to benefices, and of deciding, likewise, on grounds of extrusion. This most important privilege has accordingly always been considered as the marked characteristic of the Church of Scotland, evincing the wisdom of its founders, as well as that of the legislature that sanctioned its establishment. For what wiser or more prudent arrangement could have been made to secure the purity of its doctrines as established by that Confession of Faith, which was made part of the law of the land, and the moral fitness and usefulness of its ministers, than by investing the church itself with the sole power of giving collation, and determining at all times as to the qualifications of persons presented to benefices? If the church continued only true to itself, there could under this system be no possibility of risk of its interests ever being impaired, either in respect to the doctrine or the qualifications of its ministers; and the people belonging to it had, by this admirable provision, and the manner in which it ought properly to be exercised, a security in regard to their spiritual instructors, which few religious establishments whatever possess. Had the act 1834, instead of putting forth the more problematical assertion which it contains, set out with declaring that this its most marked characteristic was "the fundamental law of the church," its truth could have been called in question by no man capable of understanding and appreciating its value. I well remember at an interview which I had the honour to enjoy on the 4th of April 1834, with that great man who so long presided in the court of chancery, with a reputation and success second to no one that ever occupied the woolsack, and whose death the nation is now lamenting, that he emphatically said, in reference to the depending discussion on this subject in the Church of Scotland, "you, in Scotland, have a great superiority over us here, in having so thorough an investigation into the qualifications of all persons presented to livings." These words I made a memorandum of the very day they were uttered, as shewing how the constitution of our own church, in this respect, was estimated by such an authority; and I trust I shall be excused by your Lordships in here stating, that on the same occasion, the last time I

saw that noble Lord, in reference to Scottish appeals, Lord Eldon made the following statement to me, which, in justice to his memory, I think ought to be generally known; "That though he had been much employed in arguing Scottish causes for nearly 20 years before he became chancellor, and had sat judging in them for 25 years, he had never till the last approached to the decision of any one of them without the greatest hesitation and anxiety, lest he should have allowed his impressions of English law to mix themselves up with the principles of the law of Scotland."

This important right of collation possessed by the Church of Scotland, however, in so far as it includes the sole right of pronouncing upon the qualifications and fitness of a presentee, and of giving or refusing admission, has, by the act of Assembly 1834, actually been surrendered by those who held it, and transferred to the bare majority of the heads of families of every congregation throughout Scotland, whose dissent, without the necessity of assigning the vestige of a reason, and without any examination whatever into the qualifications of the presentee, by those who alone are by law entitled to inquire into them, is declared to be an absolute and immediate ground of rejection. Prior to that enactment, the church, throughout its various judicatories, beginning with presbyteries, uniformly maintained the right of determining upon all objections taken by the members of a congregation to the qualifications and fitness of a presentee. The great advantage derived from that system was, that while no man could by possibility be inducted into a benefice, without the sanction of the church to his collation, after hearing every ground of objection that could be urged by the people; neither could he be arbitrarily set aside or rejected, without an opportunity being afforded to the church itself, of openly and publicly ascertaining the validity of the objections offered to him, or whether they were not merely the result of causeless prejudices. The duty of deciding upon all objections, lay entirely with the church itself, and no presbytery could pretend right to reject a presentee, without even entering into an examination of his qualifications. If it did so, however, and presumed thereafter to admit another, whether in virtue of a presentation from a different patron, or by the exercise of its own right *jure devoluto*, the person so inducted could be entitled to no part of the fruits of the benefice, as it is well known has been repeatedly decided in this court. But under the act in question, the presbytery entirely neglects the duty of examining into the qualifications and fitness of the person nominated by the patron, and is in fact made to devolve that duty on the majority of the congregation, an irresponsible body subject to no control or review, being compelled immediately to reject, on the mere fact

being ascertained of the dissent of a bare majority of the heads of families. I can find no vestige of authority in any act of Parliament, or previous act of the General Assembly, that empowers a presbytery to devolve any one of its functions, and far less so important a one, on any other body whatever. The whole system of discipline of the church, is utterly hostile to such a devolution of duty. But by this act, the duty of the presbytery is devolved on the majority of the heads of families of the congregation, in communion with the church, whose dissent without the intervention of the presbytery, is declared to be a ground for immediate rejection. Suppose the act had provided that the dissent of a majority, or two thirds of the kirk-session, should be a sufficient ground for rejecting a presentee, could this have been held as a performance of the legal duty incumbent on the presbytery alone, of judging and deciding upon the qualifications of the person presented, and performing the duty of collation imposed upon it by positive statute?

In taking this view of the nature and effect of the act of the Assembly 1834, as being altogether *unwarranted* by the constitution of the church, I feel myself strongly confirmed by the terms of a document, to which I must here beg leave to refer. Previous to the meeting of the General Assembly 1834, the following overture was adopted, and transmitted by a very large majority of the Synod of Aberdeen, and to which it would have been well, had more attention been paid before passing the act in question. “Whereas the system, under the operation of which the ministers of the Church of Scotland are appointed to ecclesiastical charges, recognises and combines with the entire right of collation, in all its parts vested in the church: 1st, A right of presentation under certain limitations possessed by the crown and qualified subject-patrons; and 2d, a right on the part of the people, of formally expressing their consent to the admission of the presentee, or dissent with reasons to be judged of by the church judicatories, before collation granted. It is humbly overtured to the venerable the General Assembly of the Church of Scotland, that no innovation destructive of this long-tried and established system, be sanctioned or approved of by the General Assembly; and in particular, that no change of ecclesiastical law or procedure relative to the induction of ministers, tending to render void, or in any manner impair the right of collation, originally secured to this church by the statute 1567; the free and entire exercise of which right has been hitherto carefully maintained, and is not more necessary to the independence, security, and permanence of the church, than to the best interests of the people.”

This overture, which contains so admirable a compendium

of the constitution of the church on this important point, was enforced in a most able speech by a venerable friend of mine, the Professor of Divinity of the King's College of Aberdeen, who in regard to this, the inalienable right of the church as to the collation of its ministers, expressed himself in the following terms, to the justice and correctness of which I entirely subscribe. " 'This, the church's right of collation, comprehending, as has been
 " stated, that of granting admission and of extruding, with the
 " power of judging of qualifications, and of determining every
 " disputed case, arising out of these subjects in the last resort ;
 " this all important right, the church has firmly maintained at
 " all times throughout her eventful history, nor ever parted with
 " it, unless when bereft at the same time of all her other rights
 " and privileges."

That the Act of the General Assembly now under our consideration was, however, in reality new legislation, and not merely a declaration of what the existing law of the Church truly was, appears manifest, 1st, Because it was felt, that to make it binding on the Church hereafter, it was necessary after passing it as an *interim act*, to transmit it for the approbation of presbyteries under the provision of the barrier act of the church, which requires all *new laws* to be so sanctioned ;—2dly, Because it is apparent upon the face of the regulations, which are in fact part of the act itself, when providing for the exercise of the *jus devolutum*, instead of the enactment being made operative against the presentees of presbyteries, as well as those of lay patrons, it declares that it shall not apply, but " that cases of presentation by the presbytery
 " *jure devoluto*, shall not fall under the operation of the regula-
 " tions in this and the relative act of Assembly, *but shall be pro-
 " ceeded in according to the general laws of the Church, appli-
 " cable to such cases.*" Here then is an admission in plain and unequivocal terms, that this enactment is not one of the general laws of the Church, and therefore is a new one ; and as I am decidedly of opinion, a direct innovation upon its constitution. Where is the force or validity then of the assertion of the fundamental law of the Church in its preamble as the basis of this new enactment ? Is it to be operative, and the principle carried into full effect against every exercise of patronage, except those of presbyteries, as to which there is to be no reference to the inherent right of the majority of the congregation to dissent without reasons, and thereby effect the instant rejection of the presentee ; but that presbyteries under their *jus devolutum* may appoint any person except the one rejected by the *veto* of the congregation, and of whose qualifications and fitness they themselves are to be, as before, the sole judges ; and to whom collation is to be given " according
 " to the general laws of the Church applicable to such cases ?"

The terms of the 16th and 17th regulations, in declaring the right of presbyteries in regard to the *jus devolutum*, and the manner, even after the passing of *this law*, in which it shall always be exercised, do of themselves, in my opinion, afford the strongest grounds of objection to the legality of the act in question, whether in regard to the law of the Church or of the State; for I have no conception of its being any sufficient answer to state, that under the present summons there is no question raised in regard to the *jus devolutum*, and that we are at present in fact to shut our eyes to the regulations referred to. The learned counsel for the defenders felt the force of this part of the pursuer's case, and strongly deprecated any reference to the provisions with regard to the *jus devolutum*, as being a part of this law, that they were not bound to defend. But this mode of evading an objection to the validity of the act of the Assembly cannot avail, as it appears on the very face of its enactments; and if it amounts to a demonstration that the church is there assuming a right to itself, which is directly contrary to law, of declaring *when* it has acquired the power of presenting to benefices *jure devoluto*, while in exercising that right it is to be entirely free from that new enactment, which it attempts to impose upon all other patrons,—the illegality of the whole as an act of legislation is made manifest. That the church does not possess, and never did possess by law, the power of declaring, what shall open up to it the right of presenting to benefices *jure devoluto*, is a proposition which cannot seriously be contested; as the contrary has been decided again and again in this court, in the various cases that were referred to by the Dean of Faculty. When the Church asserts a claim to present to a benefice *jure devoluto*, the question, as one of civil right, must and can only competently be determined in this court; and accordingly the Church itself has for a long period entirely acquiesced in the propriety of that course of procedure.—We have seen however, that the 16th regulation provides, that “if no presentation shall be given within the limited time, to a person from whose settlement a majority on the roll do not dissent, the *presbytery shall then present JURE DEVOLUTO.*” The very terms of this regulation in fact bring its illegality to the test, and are alone sufficient to shew that it is consonant, neither with the law of the State nor of the Church.

While, in support of the validity of the act of the General Assembly, upon which the defence against this action is solely rested, reference has been made to the ancient history of the church, as appearing from the Books of Discipline, the Notes of Spottiswood, and the phraseology of certain acts of Parliament, and of those of the General Assembly, (though chiefly during those periods when the right of patronage was either totally abo-

lished, or placed under great restrictions), it is singular that no one instance has been pointed out, in which it was actually found by a judgment, either of the supreme or inferior church courts, that the majority of the heads of families of a congregation could, by their simple dissent, without offering any reasons whatever, place an insuperable bar upon the right of a presentee, and accomplish his immediate rejection, without his having even been taken upon trial as to his qualifications. If this had ever been held as the law of the church, it is impossible to conceive that instances would not have occurred where it was applied. The multitude of disputed settlements that have occurred since the restoration of patronage, must have afforded many occasions for the operation of such a rule. No such instance has, however, yet been pointed out, either in ancient or modern times, as it is well known that the cases in which the church courts, in the exercise of their own functions, refused to complete settlements, were dealt with in a totally different manner.

No direct authority, either from history or the opinions of the fathers of the church, has been produced in support of the existence of any such law. But on the contrary, the opinion of one who stood deservedly high as an authority when in life, and whose memory is still held in the highest estimation in the church, has been shewn to be decidedly and unequivocally opposed to the existence of any such right, either in the whole or any part of a congregation. If he had considered that such a right ever did belong to a congregation, it is impossible for me to conceive that the venerable baronet in question could ever have expressed himself in such terms as the following, when treating of the constitution of the Church of Scotland:—"In the Second Book of Discipline, the election of pastors is declared to be by judgment of the eldership (that is, of the presbytery) and the consent of the congregation; this language signifying, *according to all the laws that followed*, the right of the people either to give their consent, or to state and substantiate their objections, of which the presbytery were to judge. The people were not electors even by this rule; and though it gave more power to the presbyteries than was ever afterwards conceded to them, *it gave the people exactly the same place which the language of the church, both in early and latter times, assigned to them.*" Coming, as this does, from a man of the strong and masculine understanding that characterised Sir Henry Moncreiff, and whose opinions in favour of the popular side of the church were so well known, I can imagine no stronger or more explicit authority as to what the law of the church upon this point truly is; and sure I am, that if his opinion had been directly the reverse of what it is, it would have been held by many as of itself decisive of the present question.

I have now only to advert in a few words, to the competency of the declaratory conclusion of the present action, and of the right of this court to give the redress that is there demanded, in reference to the decisions that have been referred to, but into the details of which I have no intention to enter. It has been maintained upon the part of the defenders, that even supposing the act of the General Assembly 1834 was in reality *ultra vires*, and had encroached to a certain extent on the right of patronage, it is not for this court, but the legislature alone, to apply the remedy. It is obvious, however, that this position would be equally applicable to any legislative act of the church, however flagrantly destructive it might be of any civil right whatever; and indeed the same view might just as well be taken, with regard to an act of the church which directly pronounced against the legality of the whole system of lay patronage, and at once declared, that all future vacancies in benefices should be supplied, either by the election of the people themselves, or by the church itself, as in the exercise of its own right. It cannot surely, however, be maintained, after the *series rerum judicatarum* that has taken place, that it would be any defence in an action for declaring the utter illegality of such an act, and every thing flowing from it, to state, that what was objected to *was a legislative enactment of the church*, and could be altered only by an act of parliament. No such doctrine could be listened to for one moment,—all that is necessary to warrant the interference of this court in any question of this nature, being to shew, that a civil right has been affected by that which is in itself in fact contrary to law, and still more, if it is likewise contrary to the clear law of the church itself.

The exercise of the jurisdiction of this court in such cases, is far from being any interference with ecclesiastical functions, regulating merely in regard to ecclesiastical rights or privileges, which unquestionably remain under the sole control of the church itself, in its several judicatories. No right can ever be assumed by this court of interfering in any way with the church in the exercise of its proper ecclesiastical functions,—in deciding ecclesiastical causes,—or in legislating in matters purely clerical. But however indisputable the truth of this may be, the jurisdiction of this court cannot be excluded, in regard to any act or proceeding which, under the semblance of the performance of an ecclesiastical function, makes a direct encroachment on a civil right that is protected and secured by positive statute. Neither will the right of this court to give redress be excluded, if, in the performance of a duty in the exercise of which the power of the church is even exclusive and final, its courts have deviated from the injunctions of a statute. This was fully exemplified in the

case of Corstorphine, and others that have occurred, in regard to the execution of the schoolmasters' act, when this court decided in the most explicit terms, that presbyteries could be compelled to perform the duties imposed upon them by the legislature.

Since the act of Queen Anne, the right of patronage and its free exercise, have been secured by positive statute. No direct encroachment on this right, therefore, by the interposition, from whatever quarter, of a controlling and absolute right of *veto* upon the patron's *nomination*, while the church utterly refuses to examine into the qualifications of the presentee, can be deemed legal; and if the rights of both patron and presentee are thereby attempted to be set aside, they surely must be entitled, as in regard to any other civil and patrimonial interest, to have the illegality declared by the decision of this court.

It is freely admitted, as I understand, that redress may be given by this court after a civil wrong has been completed by any act or decision of the church, as whether admitted or not, it was unquestionably in fact decided, after the fullest and most deliberate consideration, and when the illegal proceedings of presbyteries were entirely disregarded, in the cases of Auchtermuchty in 1735, and of Lord Dundas against the presbytery of Zetland, at the distance of sixty years afterwards; to say nothing of the other intermediate decisions, so well known to your Lordships. The *two* decisions I have referred to, are direct and positive determinations upon the point, as they were founded on the sole ground of *the illegality* of the proceedings of the respective presbyteries complained of; while the persons they had ventured to induct were left to the possession of their cures, without being entitled to draw one farthing of the stipends. I cannot, therefore, for my life see the slightest objection to this court being called upon, before a wrong is finally completed, to declare what the law is in regard to the matter complained of. An action of declarator is one well known in our law, and even when unaccompanied with petitory conclusions, if a real patrimonial interest is sought to be declared, it is attended with the most material advantages, in guiding parties to the knowledge of their respective rights; and certain I am, that in reference to the circumstances of the present case, it is not a proceeding that ought to be complained of as unfavourable to the reverend defenders, as no one would envy their feelings, or those of any other presbytery, were they allowed to place themselves in the predicament of presbyteries in reference to settlements that they persisted in completing contrary to law. Nothing, indeed, can be more repugnant to propriety or sound policy, than that there should be a separation of a benefice from a cure; but that consequence, it is admitted, has been fixed by

decisions, and that in the last resort, as in the case of Lanark, as the inevitable consequence of a settlement being completed, in opposition to the law of the land, and of this court being called upon only to give redress after the wrong has been done. It is surely far better to have it found and declared, that by the course adopted the defenders in this case have been proceeding contrary to their duty, and in violation of law, and that they should be enjoined to perform that duty as the law has prescribed, rather than to wait till the wrong has been completed, and a great injury occasioned both to the church and individuals, by the settlement of one that is not the legal presentee.

The course, indeed, that has been followed by the General Assembly itself in all parallel cases since that of Lanark, is a strong confirmation of the propriety and fitness of the declaratory conclusion of the present summons; and holding it as perfectly competent, for the pursuers of this action to insist in that conclusion, which carefully avoids interfering with the proper functions of the church, I do not consider it to be necessary at present to anticipate what future proceedings are to follow a decerniture in conformity with it. The pursuers are at present satisfied, with merely asking, that *the conclusion shall be determined in their favour*; and it is not for this court to take for granted that the church, in the exercise of its sound discretion, will disregard the declaration of the law, or that any ulterior measures will, in reality, be rendered necessary.

Upon the whole, it humbly appears to me for the reasons which I have stated, that the pursuers have established,—

1st, That the right of presentation of qualified persons to vacant benefices in the Church of Scotland, whether exercised by the crown, by other lay patrons, or by presbyteries under the *jus devolutum*, is by law free from all fetter or restriction whatever, except what arises from the church itself, in the due exercise of its own lawful and undoubted function, of giving collation after examination, as to the qualifications of the persons presented; while the act of the General Assembly and its accompanying regulations of 1834, have operated a manifest encroachment on that right of presentation, by their conferring, before any trial or examination whatever, on a majority of male heads of families of a congregation in communion with the church, an absolute right of *veto* and rejection of the presentee, without assigning any reasons.

2d, That that act was an innovation, and contrary to the constitution of the church itself, and that as being altogether *ultra vires* of the church, and against the law of the land, its operation in the rejection of Mr. Young, the pursuer, ought to be declared illegal, under the first declaratory conclusion of this summons.

If I am, my Lords, in error in the opinion which I have now

ventured to deliver, I fear at far too great length, in regard to the law and constitution of the church, to which it was indispensably necessary that we should particularly advert, I have at least the consolation to know, that I err along with that high departed authority to which I have referred, as well as with Principal M'Farlan, with Dr. Cook, the eminent historian of the Reformation and of the Church of Scotland, and with Dr. Mearns, the Professor of Divinity in the King's College of Aberdeen,—three of the highest living authorities in regard to the laws and constitution of that Church.

Wednesday, February 28.

THE LORD PRESIDENT.—“ LORD MEADOWBANK.”

LORD MEADOWBANK.—My Lord President, feeling yesterday, that it would have been far more satisfactory to myself, after the luminous judgments which were delivered by your Lordship and Lord Gillies, if I could with propriety have been relieved from the duty of saying more in this case than that while I had arrived at the same conclusion with your Lordships, I cordially subscribed to all the views of the case which had been then presented, and I refrained from entering further into the discussion, from an apprehension of weakening that most powerful impression which the speeches of your Lordships were calculated to produce upon all judicial minds ; your Lordships must be aware, how much more I must be impressed with that feeling now, after the exposition of the law which has been given by the Lord Justice-Clerk.

But in a case of this description, I am satisfied that it would be inexpedient to yield to any considerations arising from personal feeling, and therefore I shall endeavour to explain, though I fear at some length, and with much fatigue to your Lordships, the grounds upon which I have arrived at the same conclusion with such of your Lordships as have already spoken.

In the outset, however, I feel from particular circumstances, that it is incumbent on me to state to your Lordships, that when this measure first agitated the Church, I had for some years retired from being a member of the General Assembly ; but at the time at which the interim act now under consideration was transmitted to Presbyteries for their adoption or rejection, I was, when the question came on for discussion in the presbytery of Edinburgh, a member of that body, for which in the General Assembly your Lordship and myself had for many years had the honour of sitting as representatives. Having long, as a law-officer of the Crown in its highest departments, taken some share, and the very deepest interest in the affairs of the Church, I felt therefore, that upon that occasion, it was proper for me to attend in my place in that subordinate judicatory, and whether effectually or not, at least to deliver the humble but decided opinion which I had formed of the mischievous tendency of the measure that was proposed for their adoption. In following that course, I was mainly actuated by the consideration, that I was neither called upon to form, nor to indicate any opinion as to the competency or otherwise, of the Church to adopt and sanction that enactment. Had the case been otherwise, the conviction which I felt, that the question of its legality must, if it were adopted, bring the whole matter into discussion

before your Lordships, would most assuredly have restrained me from taking any share in the deliberation of the Presbytery. But impressed with the danger which the measure, if it became a law of the Church, was calculated to produce to the character and utility of that establishment, and to the dearest and the best interests of the people, I could not reconcile it to my sense of the duty which I owed to the Church under which I was born, with which I was connected by descent, and in which I had for a great many years been an office-bearer, to withhold from those with whom I had been so long connected, an explanation of the views which I entertained upon the subject.

I am not, my Lords, going to fatigue your Lordships by entering at length upon this part of the subject. I shall only say, as I stated to the presbytery, (and as the matter appears to me now) that I was satisfied the provisions of this act of Assembly were calculated to produce, along with many others, all the evils attending a popular election of the clergy, and would eventually degrade the character of the Church. That it would drive out of the clerical profession—as Burke said of a measure not very dissimilar, adopted in the year 1790 by the Constituent Assembly of France, respecting the Gallican Church: “All young men of quiet and sober manners, all who could pretend to independence in their function, or their conduct; and that it would throw the whole direction of the public mind upon such matters, into the hands of a licentious, bold, crafty, factious, flattering set of persons, of such conditions and such habits of life as would condescend to make the livings an object of low and illiberal intrigue.” And I thought with Dr. Robertson, as Mr. Stuart says in the life referred to yesterday, “that, if the probationers of the Church, were taught to consider their success in obtaining a settlement as depending on popular assent or rejection, they would be tempted to adopt a manner of preaching more calculated to please the people, than to promote their edification.”

I have seen no reason, my Lords, to alter this opinion, and I am thoroughly persuaded, that the effect of this innovation on our Church, if sanctioned by law, must be, to separate the clergy from the wealthier classes of the community, to dissolve a union to which, in a great measure, has been owing both its usefulness and stability, and in the words of the statute of the 10th of Queen Anne, “to create great heats and divisions in every parish of the kingdom.” I take the liberty of mentioning this very unimportant share which I thus took in these previous discussions on this measure, in order that I might at the same time have an opportunity of adding, what I now most firmly aver, that notwithstanding this opinion of the inexpediency of the measure, yet, when this case came on for discussion, it was impossible for any

one of your Lordships, or for any one who had ever attended at all to the constitution of our national Church, and who, by so doing, must have had some general views of the civil rights of the State, upon the one hand, and the powers of the Church, upon the other, to have come with a mind more unprejudiced, and less warped, by previous investigations or impressions than I did, to listen to that most able argument which we had from both sides of the bar. In fact, my Lords, the very feeling that I had a decided opinion as to the impolicy of the measure, and the knowledge that such considerations were altogether foreign to the present deliberations, induced me with more anxiety to attend to every thing that was stated and submitted for our consideration, by my learned friends who have supported those views in point of law, which after the most deliberate consideration I have found it impossible to adopt.

I shall now, therefore, proceed to state to your Lordships the grounds of the judgment which I have formed upon this case, refraining however from troubling the court with any of the quotations which were yesterday so admirably made use of by your Lordship and Lord Gillies, and most of which, when I then took my seat on the bench, it was my purpose to have pointed out for consideration. I do so, however, under the most intense conviction, my Lords, of the vast importance of the judgment we are called upon to pronounce. Whichever way that judgment may go, it is impossible not to be apprehensive, that consequences of the most fearful description may attend the result. On the one hand, if your Lordships affirm the enactment of the Assembly, you declare, as Lord Gillies emphatically termed it, the right of patronage to be nothing else than “a solemn mockery.” You overturn and destroy most valuable patrimonial interests belonging to individuals—you dissever the establishment from its connection with the lay patrons, with the landed aristocracy, and with the wealthier classes of the community—and you sanction a system which, in my humble opinion, must ultimately degrade the character of the probationers of the church, and diminish the utility of our clergy in upholding the religion and morality of the country. On the other hand, by determining the enactment to be illegal, you overturn a supposed right, which the rash and, as I think, unconstitutional proceedings of the General Assembly have led congregations to imagine does lawfully belong to them—the exercise of which has already been the subject of much contention, and is in the eyes of many of great value and consideration. What effect the abrogation of such a supposed right, and of this power, so illegally and, in my humble opinion, so inconsiderately conferred, is to have upon the peace of the country, and the stability of the church, it is impossible to foresee.

But if experience ever taught great bodies of men, which it hardly if ever does, it ought to instruct those who are the leaders of popular assemblies, like the General Assembly of the Church of Scotland, the extreme danger to all institutions, and more particularly to institutions of the nature of a national church, of tampering with its usages and its customs, and of introducing measures of change and innovation upsetting established opinions, and inveterate forms, which, however opposed to theoretical perfection, have been found to work well with the main object for which they were founded. And most fervently do I trust, that, whichever way *we* may decide, there will be found in the good sense and religious habits of the people, sufficient firmness to correct the imminent evils with which, through the inconsiderate rashness of some, the love of popularity on the part of others, and the misguided zeal of many, they have thus been threatened.

I. Of the facts of the case I need say little or nothing. It is admitted that the pursuer Lord Kinnoull being patron of the parish of Auchterarder granted in due and sufficient time a legal presentation to that benefice in favour of the other pursuer Mr. Young, by whom in like manner it was formally and legally accepted. According to the practice of the church for nearly a century, the presbytery should have thereupon sustained the presentation. But instead of so doing, your Lordships are aware that the presbytery, on the 27th October 1834, pronounced a deliverance, finding, in effect, that it was *incumbent upon* them to proceed to fill up the vacancy *according to the interim act and regulations of the Assembly anent calls*, and declaring THAT ALL THE NECESSARY REQUISITES HAVING BEEN COMPLIED WITH BY MR. YOUNG, *they in so far sustained the presentation*; that is to say, in so far as was consistent with the provisions of the said act; and after directing the presentee to preach in the church on the 16th and 23d of November, they appointed a meeting of presbytery at the church of Auchterarder, &c. “on the 2d of December next 1834, being “the first Tuesday of that month, *to moderate in a call*, in the usual “way, to Mr. Young to be minister of that parish.” On the 2d December the presbytery accordingly met at Auchterarder, and moderated in a call, and their minutes bear that “*there was produced a call* to Mr. Robert Young to be minister of the church “and parish of Auchterarder,” and which was signed by Lord Kinnoull’s factor, and two other persons, heads of families. Most undoubtedly no specific objections were given in against Mr. Young to the presbytery by any person whatever, and here, according to the old practice and law of the church, the matter would have stopped, and Mr. Young ought at a future day to have been taken upon trial,—thereafter his edict served,—himself inducted by

the presbytery into the benefice, and thereupon to have received the rite of ordination. But instead of so doing, the presbytery proceeded, as their minutes bear, in terms of the interim act of Assembly, with the provisions of which your Lordships are familiar, when an apparent majority of dissents of those standing upon the roll, which had been made up in terms of that act, appeared against Mr. Young; *and IN SPITE OF THE CALL IN HIS FAVOUR*, upon that ground and that ground alone, the presentation in favour of Mr. Young, *was finally rejected by the presbytery, without judging of his qualifications, and their sentence was confirmed by the General Assembly.*

In these circumstances, the short but unquestionable view of the case is this, that the undoubted patron of this parish having presented an individual to the living not alleged to be disqualified in point of life, godliness, literature, and learning of any kind or description, and who, whether necessary or not, *had received a call* to the living, drawn up according to the usage of the church, and having in itself far less of the “mockery” of a call than three-fourths of those which had been sustained for nearly a century by the ecclesiastical judicatories, has nevertheless and notwithstanding, been rejected by the presbytery, who, it cannot be disputed, were, by the various statutes allowed to be in force, obliged and required to admit whatever *qualified* persons shall be presented by the laick patrons; and that all this has been done exclusively in virtue of the obligation imposed on the presbytery by the interim act of the General Assembly.

Finding themselves reduced to this situation, the patron and his presentee,—whose civil interests had thus been set aside, and who allege that the question between them and the presbytery, thus acting in obedience to the order of the General Assembly, involves not merely one of church discipline, (which alone the ecclesiastical courts are competent to determine), but that, as want of qualification on the part of the latter was not alleged, his rejection was a direct infringement and violation of the civil right inherent in both—a right which is just as sacred, and which the law is bound to protect just as much, as those which can legally be claimed as belonging to the church,—have raised the present action, the conclusions of which have already been brought so fully under the view of your Lordships, that it is unnecessary for me now to refer to them, and which, it appears to me, are drawn up in a manner sufficiently technical and formal to authorize the decree sought by the pursuers.

Against this proceeding, the first and the main obstacle which has been raised on the part of the defenders, is the plea of want of jurisdiction on the part of your Lordships to entertain the question at all. It is said, that the presbytery, in rejecting the pursuer,

acted in their ecclesiastical capacity alone: That in the whole proceeding, they were in the course of conferring the pastoral office; and hence, that they were acting within the exclusive jurisdiction of the Church, whose determination is final, and altogether exclusive of any jurisdiction vested in this or any other civil court. This I understand to be stated as a general proposition, and as a plea founded on the constitution of the Church as an ecclesiastical body. But before we can reason satisfactorily upon this portion of the question, it seems necessary for your Lordships to attend in the first instance to the foundation on which we are to hold, that the rights and privileges of the Church, as an Established Church, exist.

Now, upon this subject I should have thought it necessary to make hardly a single observation, as in the written pleadings for the defenders it seems scarcely to be contested, that considering the Church as an establishment, it is to be held as the mere creation of the legislature, had it not been that in the able argument of the Procurator of the Church, he appeared to rest his claims to its powers, prerogatives, and privileges upon a much higher ground, and one which, as it appears to me, your Lordships cannot and ought not to recognize—one which never was acknowledged by the state, and which is contradicted by history, and by the enactments of the supreme power of the realm to which all courts, both ecclesiastical and civil, must be subservient—that authority which your Lordships said was the civil head of the Church of Scotland—the three estates of the realm; but in making this observation, neither your Lordships nor myself have any purpose of interfering with the established and unquestionable principles, that in matters spiritual, the sole Head of our church, is one supreme and invisible, our Lord and Saviour.

I have no intention, however, of fatiguing your Lordships by going into the particulars of that history, or the terms of the statutes to which I have generally referred. But it is necessary to recall to recollection, how the present Church of Scotland came to be formed as one of the establishments of the country.

Previous to the year 1560 it was not recognised by parliament or the country. In the year 1559, as we learn from Knox, a kind of Synod had assembled, and in imitation of some of the continental churches, superintendants, many of them laymen, were chosen to conduct and regulate the concerns of this association.

In the year 1560, however, the authority of the Pope was overthrown and abolished by the legislature; and in the same year the Confession of Faith, as drawn up by the first fathers of the reformed church, was acknowledged and recognised in parliament as the articles of the true Christian faith. But that statute

removed the Roman Catholic bishops and the Roman Catholic priests neither from their offices nor their benefices; and, as matters then stood, there can be no doubt, that as all presentations by the lay patrons were by law (whether common or statute, I do not stop to inquire, and it is little to the question under consideration,) required to be addressed to the ordinary, the sole right of giving *collation* to benefices, continued to be vested in a class of individuals hostile to the reformation, and whose power must necessarily have operated in some measure to the exclusion of those in connection with that body, who though not established, were recognised, spiritually speaking, as the true church. This obviously had the effect of creating a great jealousy on the part of the kirk, and in, and during the years intervening between 1560 and 1567, this formed a main subject of discussion betwixt the courts of Queen Mary and her son, and the Reformed clergy.

The views of the church were, however, far from excessive; and though at first resisted by the court, were in consequence finally successful. They were fully developed in the answer of the General Assembly to a message from the Queen in the year 1565, read by the Lord Justice-Clerk; but to which, as the foundation of the statute 1567, I beg again to direct the attention of your Lordships.

“ Our mind is not that her majesty, or any other patron, should be deprived of their just patronages, but we mean, whensoever her Majesty, or any other patron, do present any person into a benefice, *that the person presented should be tried and examined by the judgment of learned men of the Church*, such as are the present superintendents, and as the *presentation unto the benefice appertains unto the patron*, so the collation by law and reason *belongs unto the Church*; and the Church should not be defrauded of the collation no more than the patrons of their presentation; for otherwise, if it be lawful to the patrons to present whom they please, *without trial or examination*, what can abide in the Church of God but mere ignorance.”

In the year 1567, accordingly, the act respecting the admission of ministers was passed almost in terms of the address of the Assembly, by which the right of examination and admission was acknowledged as being in the Church (*always saving the rights of the just and ancient patrons*); and in which statute it was enacted, “ that the presentation should be directed to the superintendent of the parts where the benefice lies.”

If he refused to admit, a remedy was given to the patron to appeal to the synod of the province, consisting of the superintendent and the clergy, and from it to the General Assembly; but if the superintendent received the person presented, there

was an end of the matter. No party had a right to object to the induction. His determination was declared to be final and conclusive. This was a state of matters, your Lordships will observe, totally inconsistent with the whole system of presbyterian discipline. By lodging such power in the hands of the superintendent, whether lay or ecclesiastical, an end was put to presbyterian equality, and no means being afforded for the interference of the church courts, except when the patron should feel himself aggrieved, that power of review and correction in the different judicatories, which is one of the great and distinguishing features of the system, was extinguished.

Before leaving the consideration of this statute, it may be as well to state that these superintendents were not necessarily other than laymen. As Knox says, "Before there was any face of a true religion within this realm, it pleased God of his great mercy to illuminate the hearts of many private persons, so that they did perceive and understand the abuses that were in the papistical church, and therefore they withdrew themselves from the participation of their idolatry, and because the Spirit of God will never suffer his own to be idle, and a variety of persons could not be kept in good of obedience and honest fame," &c. So it appears that about the year 1559, the first superintendents were chosen from among persons of the greatest weight and consideration who had connected themselves with the reformed faith. Among these was Erskine of Dunn, a layman; and various others occupying the same office, were, it is understood, of a similar condition in life; and it is a remarkable feature of the act 1567, that it contained a provision which was probably intended to conciliate those invested with the rights of patronage, who no doubt cared a great deal for the interests of the Church, but never forgot the interests of themselves,—that there should be left in the hands of a class of individuals, not necessarily churchmen, the exclusive right of admission of those presented to the benefices. Your Lordships will also observe that this right of admission being vested in a public officer who might be a layman, it clearly was not essential in the ceremony of admission, that there should be any thing of a character necessarily spiritual connected with it. On the contrary, it is clear enough that, while it gave the right of examination to the Church, the legislature took especial care that the reserved right of patronage should be secured, by placing the power of admission in the hands of a class of public officers whose interest in the laick patrons was even stronger than that which they had in the rights of the ministers of the Church, or the congregations of the people.

While this statute however might have had the effect of preventing the admission of popish priests to the benefices, and of securing the right of the reformed church to examine presentees, un-

der the obligation of admitting such as received presentations from the laick patrons, it was obviously a legislative enactment which, in *its main provisions*, must fall and be of no avail, as soon as presbytery itself was established. In fact, whenever the superintendents themselves came to be abolished, the whole of the enactment necessarily fell along with them, excepting that which declared, 1st, That the examination and admission of ministers should be only in the power of the kirk; and 2d, That the presentation of lay patronages should always be preserved to the laick patrons.

From the year 1567, the struggles between the churchmen and the court seem to have been incessant. In 1572, c. 40, the subscription of the Confession of Faith, however, was enjoined to all holding benefices, and the statute of 1579, c. 46, declared that if they did not, they were to be liable to deprivation.

In 1581, the king gave his consent to the constitution of presbyteries throughout the Church, but the bishops, generally, and those assuredly who had abandoned popery and signed the Confession of Faith, retained their jurisdiction, their offices, and their emoluments; while the extent of the claims set up by Melville and others, who were then drawing up the Second Book of Discipline, having alarmed the court, led, in the year 1584, to three several enactments, the first of which, (chap. 129,) confirmed the king's power and authority over all estates, *as well spiritual* as temporal, within the realm, and declared that his councils should be judges competent over all the subjects spiritual and temporal. The second, chapter 131, discharged all judgments of jurisdictions, spiritual and temporal, not approved of by the king and the three estates in parliament, and prohibited the holding of all councils, conventions or *assemblies*, on any matter of estate, civil or *ecclesiastical*, without his Majesty's special commandment; and the third, chapter 132, conferred the whole powers upon the bishops of the diocese to call, try, and adjudge, clergymen guilty of the vices therein enumerated. These statutes therefore had the effect of completely overturning the whole constitution of presbytery as recognized by the crown and the legislature, or almost as pretending to an existence as a tolerated body within the realm; and therefore at this period, it is impossible, I think, to doubt, that in a legal sense the Church had no right, either civil or ecclesiastical, which either the state or its courts could recognize or enforce. It had hitherto never possessed any separate and independent existence. The true and holy kirk contemplated by all the ancient laws, was the church professing the Roman apostolic faith, to whose rights the reformed church had not succeeded, or, till lately pretended to have succeeded. At the period we are now contemplating, therefore, the reformed church had no more connexion with the state, than if its ministers and its judicatories had

been consulting upon what ought to be their rights and privileges in another country. In this situation matters continued till the year 1592, when presbytery was established by the statute, chapter 116. Of the precise terms of that enactment, I shall afterwards have occasion to speak, but without going into the particulars of it at present, I think it very plain and manifest, that it is to it, and to it alone that the church owes its character as an establishment, and is entitled to exercise any of its powers as a member of the state—that it is in vain to look to previous statutes applying to a state of things totally inconsistent with presbyterian church government—and therefore it must be regarded as an institution deriving its authority from statute alone. Indeed it was hardly attempted to be argued that it owed any of its rights, powers, or privileges, to the operation of the canon law, or that it possessed any other inherent right to any power or privilege except that which the legislature has conferred upon it. Now, no subsequent statute could change or overturn this original character of the National Church. And upon this view of the matter, as it appears to me, the success of the argument against the plea maintained by the defenders, to which I am now addressing myself, entirely depends. For if the church possesses its powers by the grant of the legislature, I cannot conceive how it can be successfully maintained, that if those powers have been exceeded, and if under the pretence of exercising ecclesiastical jurisdiction, which the state *has* given it, the church court has usurped the power of the civil magistrates, and of interfering with the civil rights of the people, which it has *not* given it,—that act of usurpation is not to be either remedied or prevented by those whose duty it is to compel obedience, in all orders of the state, to the authority of the law.

In a free country, the legislature alone is supreme. With us it is supreme, when acting in its corporate capacity of King, Lords, and Commons; indeed, in no other sense is it the legislature. But if any one of the branches of the estates of parliament assume a power not belonging to it, we know well, from what occurred in the cases of Ashby, Burdett, and Stockdale, to which I need not more particularly refer, as they were so ably commented on yesterday, that those by whom it pretends to execute its will, are made amenable to the law and the tribunals of the country. So it must be with all inferior and subordinate departments of the state. A corporation may have the right to make bye-laws—the Court of Justiciary has the right of making acts of adjournal—the Court of Exchequer of making orders of court; but there can be no question that if a corporation, or these courts, were, under the pretence of exerting such right, to enact laws upon matters not duly within the province of each respectively, immediate redress against measures so unconstitutional would com-

petently be applied for and obtained. It is not many years ago that the Court of Exchequer attempted, by an order of court, to interfere with the ordinary jurisdiction of your Lordships, by preventing its officer from appearing in a process of multiplepoinding, in which he had been called to give an account of a fund that had come into his hands, under the supposition that the estate had fallen, through a party dying without heirs, to the crown, as *ultimus heres*. But in so doing, it was manifest that the Barons had exceeded their power, and, after some discussion, and a good deal of heat, they submitted, as the Lords and Commons had done before them, to the supreme authority of the law. In like manner, the same result attended the presbytery of Edinburgh in the case of Corstorphine, for, even when acting in its ecclesiastical capacity, having committed a wrong, it was obliged to yield obedience to the injunctions of this court. And so, I apprehend, it must be with the presbytery of Auchterarder in the present case. The church courts are of statutory creation. They have special powers conferred upon them. In the exercise of those powers they are entitled to receive the co-operation and assistance of the civil power. But if they exceed the measure of the authority so conferred upon them, and interfere with temporal rights and temporal concerns, from which they have been specially excluded and debarred, the civil magistrate must have authority to interpose the arm of the law against what then becomes an act of usurpation on the part of the ecclesiastical power. Were it otherwise, anarchy, confusion, and disorder, would inevitably follow. Indeed, as it appeared to me, the Solicitor-General, by not disputing that if any measure adopted by the ecclesiastical court should be unconstitutional and beyond the powers intended to be reposed in it, the legislature might competently interfere by positive enactment to correct the abuse, did in fact admit himself out of court; for the legislature can only act by its ministers, and through those courts of justice which the constitution has created for keeping in their proper places all orders and conditions of the state. Just put the case, that the legislature were to adopt the measure of interfering by a special enactment upon this occasion, and to pass a declaratory statute that the act of the General Assembly in question, with all its regulations, was an illegal enactment, and beyond the powers of the church, being a direct interference with the civil rights and privileges of patronage—by whom, I would humbly inquire, must it be that effect could be given to the declaration therein contained? I submit it to your Lordships as perfectly clear, that the power of enforcing such a statute must be held to have been devolved upon this court; and if no direct or specific remedy was pointed out by which the wrong might be redressed, recourse would just be had to the ordinary measures provided in

similar cases for protecting the rights or the liberties of the subject. But I would, with all submission, inquire what is the difference between the case supposed, and the one we have before us? The only distinction which I can discover is, that in the former we should have had, as a guide and direction for our judgment, a special and precise declaration of the legislature, while, in the other, we must dissect and examine a variety of statutes, in order to discover what was the purpose and intention of the legislature as to the nature and extent of the powers which it had conferred upon the ecclesiastical courts, and whether or not the measure complained of was one emanating from a legitimate use of those powers and privileges; or whether, on the contrary, it was effected in violation of rights specially reserved from the jurisdiction of the church.

But I cannot help observing before leaving this part of the case, that the plea of want of subjection to the civil courts in matters of this description, is rather singular, as coming from the quarter in which it has been preferred. The church, by the terms of its own Confession of Faith, is restrained from interfering with all questions of civil right. In that respect, its claims are not so high as many of those which are claimed by the Church of Rome, and the Episcopal Church of England, and yet I believe it cannot be doubted, that by the common law of England, in times of Popery, when the king was in no sense the head of the church, a patron whose right of presentation was resisted by the ordinary, had his remedy by means of the civil courts, to compel him to render it effectual. By the statute of Westminster, the 13th of Edward I., the remedies competent to patrons were considerably enlarged, and various writs, such as the writ of right of advowson, the writ of right of last presentment, the writ of right of *quare impedit*, were, with others, afforded to the patron, whose right of advowson had been disturbed by the rejection of his presentee. Nay, it would seem that even in the case of rejection of the presentee in consequence of disqualification arising from incompetency, the patron had his right of action at common law against the bishop to compel him to support the ground of his refusal.

I must acknowledge, therefore, that I should have been very much surprised if I had been obliged to arrive at the conclusion, that in our church, which has no foundation in the common law, but is the mere creature of statute, I must have been compelled, *in limine*, to have given effect to the plea, that there was no authority in the civil courts to restrain the ecclesiastical within the true boundaries and limitations of the jurisdiction, which, at their establishment, the legislature had conferred on them.

II. Holding it therefore as clear that, if the measure complained of is not one falling within the legal exercise of those powers conferred upon the church by the statutes by which its existence was recognised and established, or as the purpose and meaning of the same have been established by usage, your Lordships must have power to restrain it, and to give effect to those means which you have at command either for redressing or preventing any wrong committed under it, I have now to state to your Lordships the grounds on which it appears to me that no such power was conferred by any of those statutes, particularly by that of 1592; while there is clear and distinct evidence that every claim to the exercise of such powers was rejected and excluded from the enactments of the legislature, and have no sanction from the subsequent customs and usages of the church, during these times to which we are at liberty to look for them in its proceedings.

In the first place, I apprehend it to be indisputable that the Second Book of Discipline never has been recognised as making the law of the church by itself; that it can only be treated as in connection with the statutory enactments with reference to its several provisions; and if your Lordships examine, as indeed you must have done, and as was done by the Dean of Faculty in the pleadings, and by Lord Gillies yesterday, in so clear and luminous a manner, the different clauses of that book, as contrasted with those provisions actually enacted by the legislature, you will hardly (at least I for one cannot) entertain a doubt, that the whole of those not found in the latter, were absolutely and entirely rejected by parliament, and whatever is not so found cannot be recognised by your Lordships as forming any portion of the true rights and privileges of the church. I have said the statute does not in any way recognise the Second Book of Discipline as a work of authority, and of itself containing the laws of the church. It is not mentioned from beginning to end of that enactment, and while the statute ratifies and approves the presbyteries appointed by the said kirk, with the full jurisdiction and discipline of the said kirk agreed upon by His Majesty in conference had be his Highness, with certain of his ministers convened to that effect, it at the same time, as if to exclude the possibility of recurring under the terms of that general enactment, to any of the special clauses which had not been admitted or agreed upon, and in order to limit the whole,—by the following words, confines these powers to those afterwards specially enumerated, viz.: “*of the whilk articles the tenor follows.*” But without such special recognition by parliament, which did not take place here, none of the books of the church ever were held to have been sanctioned by law. Even the rebellious Convention 1669, found it necessary to interpose its authority to the Directory, thereby in effect declaring that

without such it would have had no validity. Now, in these articles in the statute 1592, your Lordships have heard, that, while there is little or nothing said of the grounds which were laid for the claims set up in the chapter which treats of the kirk and policy thereof, on claims originally flowing from Almighty God, there is an absolute omission of the whole of that clause, (Peterkin, 113, vol. i.) which formed a prominent and important part of the claims of the church, viz., the declaration that election “is the choosing out a person or persons maist able to the office that vaukes be the judgment of the eldership (that is, presbyteries), and consent of the congregation to whom the person or persons beis appointed.” Neither is there a word to be found in the statute “that nae person be intruded into ony of the offices of the kirk without the consent of the congregation to whom they are appointed, or without the will of the eldership.” But on the contrary, the statute expressly provides that “the foresaid presbyteries shall be bound and astricted to receive and admit whatsomever qualified minister presented be His Majesty or lay patrons,” and simply directs that the presentations of such “are to be directed to the particular presbyteries in all time coming, *with full power to give collation thereupon.*”

But the obligation herein imposed on presbyteries, is to receive and admit the presentees of lay patrons, while, at the same time there is conferred the power *to give collation* upon presentations made by the patrons. No other provision is made for the induction of the presentees into the livings to which they might be presented; and it is necessary therefore that we should distinctly understand what the legislature must have meant by *the power of collation* which was here bestowed. In the interpretation of all statutes, the first thing to ascertain is the true meaning of the terms employed in them, and as the meaning of words alters with the times, and as the language of the law often varies from that of common parlance, we are to examine, and to be regulated, by books of authority, for determining the import of terms which may be questionable or doubtful. Now, the definition of collation as given by Sir G. Mackenzie is this, that the patron “having given his presentation to the bishop, he (*i. e.* the bishop), causes serve an edict in nine days, wherein all persons are, after divine service, advertised to object *why* such a man should not be admitted to the benefice, and if none object, the bishop confers the church and benefice upon the person presented, *and this is called collation.*” But the right and power of collation was at first vested in the Roman Catholic bishops, next (at least something corresponding to it,) in the superintendents. With reference to all these, and especially to the former, collation therefore had but one meaning, that of serving the edict, and if no special and well-grounded

objection was made, then, of admitting the presentee. But when the same power by the very same term was for the first time vested in the presbytery, a body of entirely new creation, and coming in the place of the ordinary, I apprehend the only legitimate conclusion is, that the term when applied to them, must be held as importing the same meaning as it did when applied to those who preceded them; and hence that the limit and extent of the power of collation bestowed, was the same as that belonging to the functionaries of the unreformed church.

But, *first*, it may be said, that by thus limiting the powers conferred on presbyteries by the statute, we should take away from the church the right of examination of ministers to be admitted into the benefices, as that was not comprehended, according to Mackenzie's definition, under the term *collation*. But it seems to me, that the parts of the act 1567, chapter 7, which were preserved by the act 1592, (through its confirmation of the act 1581, in which that statute was re-enacted,) were the provisions bestowing this very power on the church, and also the portion of it reserving the rights of the laick patrons. That statute, it will be recollected, confirms the statute 1581, chap. 99, which ratified and approved of the act 1567, chap. 7. But your Lordships will observe, that by the establishment of presbytery by the act 1592, the whole of the act 1567, chap. 7, in so far as it directed presentations to be addressed to superintendents, and gave those superintendents the power of giving admission to presentees without limitation and control, was necessarily extinguished, and annulled, and "came to an end," by the injunction of that act, to direct presentations to presbyteries, giving to *them*, and *not to superintendents*, the power of collation, and establishing that subjection of judicatories, which, whether the presentee or any other party objecting, gave the right of appeal to the higher church courts—matters altogether contradictory of the injunctions of the statute 1567, and which thereby fell as a matter of course when that different system was established.

But the first clause of the statute 1567, chap. 7. is subject to no such observation. By it the legislature declared, "that the examination and admission of the ministers within this realm be only in the power of the kirk, now openly and publicly professed within the samen, the presentations of laic patronages always reserved to the just and ancient patrons." In that provision there is nothing to be found inconsistent with the act 1592; and therefore when the act 1592 confirmed that statute, (1581, and all the acts thereby confirmed), as a statute in favour of the true kirk, it is impossible to hold, consistently with any just principle of interpretation, that it confirmed any other part of it than that to which I have now referred.

Thus it is, then, that by the act 1592, the patron had a right to

grant a presentation, to a qualified person, which it was his duty to address to the presbytery. The presbytery had by statute the right to examine into his qualification, and I think that, from the meaning of the term collation, if upon cause shewn an objection was stated to the admission of the presentee on serving the edict, which was an essential of collation, it was the duty of the presbytery, coming in place of the ordinary, to take cognizance of the objection. This is the fundamental law of the church, allowing reasons of dissent, and I was surprised to hear it said by the defenders, that there was no written law allowing of, or even mentioning such reasons. But then the power of judging of these rested in the presbyteries, and in them alone,—they had no right to delegate either their power of examination, or of judging of objections, to any third party whatsoever. It was a power committed to the church, and to the church only, by the whole branches of the legislature, comprehending the representatives of those very congregations to whom it has been supposed the church retained a right to delegate a portion of its functions. At this time, then, the congregation was never acknowledged in the proceeding in receiving and admitting a minister, except that, by the service of his edict, all persons were called upon to substantiate any valid objection which they might know against his admission. The consent never, in so far as I can see, was said to be necessary, or held to be necessary. On the contrary, from the silence of the statute, from the want of all evidence to the contrary, and especially from the terms of the act of Assembly 1596 itself, I think we are bound to conclude, that the claim in behalf of the congregation, set forth in the 2d Book of Discipline, having been disallowed by the legislature, the church acquiesced, and abandoned that part of its pretension, just as it gave up the right of election, to which also it had laid claim, and acknowledged the right of patronage, which the 2d Book of Discipline declared “could not stand with that order in the church which God’s word craved.”

The terms of this act of Assembly are extremely important, not as affecting the question of law, but as proving the utmost extent to which on this subject the claims of the church extended; because from the beginning to the end of it there is not any thing like a trace of a right in the congregation to interpose a negative upon the reception of the presentee other than that which was implied under the term collation, of objecting to admission upon cause shewn. The act is in the following terms:

“Corruptions in the Office.—For as much as by the too sudden admission and light tryall of persons to the ministrie, it cometh to passe that many scandals fall out in the persons of ministers: it would be ordained in time comming, that more diligent *inquisition* and *tryall* be used of all such persons as shall enter into the ministrie.

“ As specially these points. That the intrant shall be posed upon his conscience, before the great God, (and that in most grave manner), what moveth him to accept the office and charge of the ministrie upon him.

“ That it be inquired, if any by solistation, or moyen, directly or indirectly, prease to enter in the said office : And if it bee found that the solister be repelled, and that the presbyterie repell all such *of their number* from voting in the *election* or admission as shall bee found moyeners for the soliciter, and posed upon their conscience, to declare the truth to that effect.

“ Thirdly, because by presentations many forcibly are thrust into the ministrie, and upon congregations, that utter there- after that they were not called by God : It would bee provided that none seeke presentations to benefices without advice of the presbyterie within the bounds whereof the benefice is ; and if any doe in the contrarie, they to be repelled as *rei ambitus*.

“ That the tryall of persons to be admitted to the ministrie hereafter, consist not only in their learning and abilitie to preach, but also in conscience, and feeling, and spiritual wisdom, and namely, in the knowledge of the bounds of their calling, in doctrine, discipline, and wisdom, to behave himselfe accordingly with the diverse ranks of persons within his flock, as namely, with atheists, rebellious, weak consciences, and such other, wherein the pastorall charge is most kythed ; and that he be meet to stop the mouthes of the adversaries ; and such as are not qualified in these points to be delayed to further tryall, and while they be found qualified. And because men may be found meet for some places who are not meet for other, it would be considered, that the principall places of the realme be provided by men of most worthy gifts, wisdom, and experience, and that none take the charge of greater number of people nor they are able to discharge : And the Assembly to take order herewith, and the act of the provinciall of Louthain made at Linlithgow, to be urged,” &c.

In this act of Assembly, not one provision is made for taking, or one word said about, the consent of the congregation, or any part of it ; and it is impossible to read its different clauses without being satisfied, that they are quite inconsistent with the existence of any such being required, or even contemplated.

But I have to submit to your Lordships as a very important consideration, if well founded, that by conferring the power of admitting into benefices upon the church, by employing the term *collation*, the legislature did not recognise the ecclesiastical power of giving *ordination*, as connected with the induction into the benefice. No doubt the right of ordination was in the church. But when the law secured the right of the laick patrons, and

conferred on the church the right of collation, it did not in any way refer to that being a part of the *rite* of induction and reception into the benefice. On the contrary, ordination was altogether a separate and spiritual act, and therefore was carefully by the statute distinguished from the other, which was exclusively a civil right, and equivalent to giving infestment in an heritable estate. (Bankton, lib. ii. v. 12.) With ordination the legislature had no desire to interfere. It left the regulation of that to the church, and therefore omitted it from the enactment altogether.

But, observe how important this consideration must be in determining whether the right of negative now conferred on the heads of families, is to be viewed as a privilege ecclesiastical, (or spiritual of the defender's will), or the mere exercise of a civil right. For, if the obligation to give collation, had no connection with the power of ordination residing in the church, then, it is manifest, that the effect of the exercise by the congregation, of the negative, conferred by the *interim* act of the General Assembly, was that of annulling the obligation of reception *civilly* imposed on the church. And in this view we are bound, I conceive, by the very discipline of the church itself, to consider it. Because as the power of ordination was vested in the church without control, it was, ecclesiastically speaking, beyond their competency to have placed a negative on the exercise of that sacred right vested in them by the spiritual Head of the church, without limitation or control, from any quarter, in any body of men whatsoever. But it may be said, that unless the church ordained the presentee, the clerical functions could not be performed. This may, or may not be so. It is not of much importance one way or other. But the statement may be doubtful. If the person presented to the benefice, and collated thereto, was previously ordained, he was entitled to discharge all the duties of a minister without ordination of new. If he was not, then he could only preach and visit the sick, or discharge the like duties. But if qualified, how could the church refuse ordination in discharge of the high obligation required of it by its spiritual head? Such a violation of duty towards Almighty God is not supposable. Now observe how this simple view of the matter explains another observation of Sir George Mackenzie, "That the right of presentation is the right "of nomination to the office of minister;" and how important it is when we are required to interpose our powers to enforce obedience of the civil obligation, without at all interfering with the *spiritual right*, which in that view has no connection with it.

Considering, then, that the rights of patronage were, by the constitution of the church, reserved entire to the just and ancient patrons, just as the same had existed from remote antiquity, when the exercise of their rights was subject to no control upon

the part of the congregation, either as withholding their consent or as imposing a negative upon the nomination ; and looking to the act of Assembly 1596, I would submit to your Lordships, that if this question had arisen in the year 1593, Melville and others could not have turned round upon the lay patrons, and insisted upon creating such a right of negative upon the exercise of the civil rights so distinctly reserved to them. The answer must have been complete, that any such right of negative was effectually excluded by the restrictive terms of the statute 1592, and they must have been met with the reply afforded by the terms of the message of the General Assembly to the Queen in 1565, which showed that all that the church contended for originally, and all which it must be held, from the terms of the statute passed thereupon, and what followed, was allowed them, was, that the person presented should be tried and examined by the judgment of learned men of the church ; and that there never was in view to confer a power of rejection upon another body, never recognized, consulted, or acknowledged in the act of collation. Being very clear, that this must have been the result of any attempt such as the present, during the times immediately succeeding the establishment of the presbyterian church government, I have been at a loss to discover how the difficulties are to be removed by what afterwards occurred between them and the year when the act of the 10th of Queen Anne was passed restoring patronages.

But to proceed, very soon after the act 1592 the bishops were restored to the church, and, in the face of its protestations, were replaced in parliament.

In the year 1606, episcopacy itself was re-established, and in 1612 presbytery abolished ; and from that period the rights of patronage were exercised under the forms required by the canons of that church, taken, it is understood, from those of the Romish and the canon law, till episcopacy was in its turn overthrown. Of course, we can derive no light from the proceedings of presbyterian judicatories under that system, with reference to its connection with the establishments of the state. No doubt the spiritual functions of what it termed its judicatories, continued to be exercised, but whatever these proceedings might have been in an ecclesiastical sense, authority they can have none in regulating our views of the established church, in connection with its power of limiting the exercise of civil rights ; and again, although the presbyterian religion was attempted to be restored by the usurping conventions, or parliaments, as they were termed, during the time of the great rebellion, even if we were not precluded by the operation of the acts recissory, passed at the restoration of Charles II., from looking to the proceedings which then occurred as affording matter of legitimate authority, any informa-

tion we could receive from them could be little applicable to a point involving nothing but a question of legal and authorised power.

By the statutes to which I have last referred, not only were the acts of these conventions then held repealed, but also by the same enactments were annulled the proceedings of all *parliaments*, *conventions*, and *assemblies*, whether *civil* or *ecclesiastical*; and all *acts* and *practices* done in pursuance thereof, were declared to be null and void. To none of these, therefore, as authorities, can any regard whatsoever be paid; and I submit, that episcopacy having been again replaced in 1661, we have no authority to look to upon this subject till after the year 1688, when the episcopal church was finally abolished.

But, unfortunately for the purposes of the present discussion, patronage itself shared the same fate at the revolution; and, therefore, I apprehend that the statutes 1690, chap. 5, or 1690, chap. 23, in which an order of proceeding was established more agreeable to the pretensions set up in the Second Book of Discipline than any which had been asserted at the establishment of presbytery in 1592, would, even themselves, be an illegitimate source to which to look for gathering authorities upon this subject. But indeed, as I read the statutes, even the powers which were thus recognised as belonging to congregations, are utterly opposed to the supposition that there was any right existing, in any quarter, to negative, without cause shewn, the nomination of the person elected by the heritors and elders. But observe, that these statutes prove that the church must itself have admitted, that even this right did not belong to congregations at common law, or in virtue of what might be termed the rules authorized by its own discipline appearing in any of those works which, as a spiritual body, it was in the custom of regarding as its codes of authority. If it had done so, the provisions of the statutes were unnecessary, and this very enactment seems to me to afford the strongest evidence of the legal understanding of all parties interested in making the enactment, the legislature, the people, and the church, that no such consent was required on the part of the congregations in the induction of the clergyman.

It seems proper, however, to attend precisely to what was done by these two statutes, 1690, chap. 5 and 23. By the first of these, the statute 1592, which had been repealed in the year 1612, and ineffectually attempted to be restored during the rebellion, was revived, except, indeed, that part of it relating to patronage, which it provided, was hereafter to be taken into consideration. Now, the part of the act 1592 which related to patronages, was not only that portion which recognised, in terms, the right of patrons to present qualified persons, and *bound and astricted presbyteries* to receive and admit such as might be presented by laick patrons,

but that portion of it also which affirmed the statute 1581, itself confirming that part of the statute 1567, chap. 7, also reserving, in terms, the presentation of lay patronages to the just and ancient patrons.

The effect of this provision of the statute 1690, was therefore not only not to leave rescinded the act 1592, but also the acts 1581 and 1567, in so far as all of these referred to laick patronages. But that left altogether entire every other portion of the statute 1592, and of those statutes enacted in the years 1581 and 1567, which did not refer to the rights of patrons, and which had not been either actually or virtually repealed by the statute 1592 itself, viz. the portion of the statute 1567 which had been "virtually annulled, and expired in itself," by the establishment of presbytery in the year 1592, being that which directed presentations to be addressed to the superintendents, on whom it conferred the power of admitting the presentee to the living, without his decision being subject to the control either of the synod or the General Assembly,—a provision, as I have said before, utterly inconsistent with the rules and discipline of the presbyterian church. For it is in vain to say, that when the statute expressly confined the right of appeal to those cases where the superintendent rejected the presentation, we are to be compelled to interpret the statute as having meant to confer such right when the superintendent sustained the presentation improperly, because such right was recognised as belonging to the spiritual discipline of the church, as acknowledged in the First and Second Books of Discipline. I, for one, deny the existence of any authority for so dealing with the acts of the legislature. We have no right to confer such powers by implication; and I, for one, can only regard these two books as having only relation to the constitution of the church as a spiritual body, not connected with the state, and not then established; and the statute itself as a distinct and separate provision for carrying into effect a civil right specially reserved to the laick patrons, and subjected to no control except that which was specially recognized by the legislature.

In this way, it will be observed, that while the act 1592 was revived by the legislature by the act 1690, with the exception in question, there was revived along with it that portion of the statute 1567, chap. 7, which declared that "*the examination and admission of ministers within this realm be only in the power of the kirk, now openly and publicly professed within the samen.*" And speaking with reference to the statute laws of the realm, it is in virtue of this enactment, so revived, and so continued, that I find authority for that power of examination of the qualifications of its ministers which is admitted to belong to the church,—which is of itself sufficiently authorita-

tive, and which imposed a solemn duty on its judicatories, which it was, I submit, a duty that they, in obedience to the law of the realm, were bound to discharge, for the purpose, independent of all ecclesiastical authority whatsoever.

So matters stood till the other statute, 1690, chap. 23, which I have referred to, was passed, in which it was provided that the heritors and elders were to name and propose the person to the whole congregation, to be either *approved* or *disapproved* by them, and if they disapprove, the disapprovers should give in their reasons to the effect that the matter might be cognosced and concluded by the presbytery; and which your Lordships will observe, is the first statute to which reference can be legitimately made, recognising in express terms, any right of interference on the part of the congregation, a right which, I have said, it required *the act of the legislature, and not of the church, to confer*. It however was a right with reference to a state of matters not only totally inconsistent with that of patrons, but one by which that right was absolutely and entirely excluded,—a system in which that right was declared to be an inconveniency, and subject to abuse.

It is curious enough, however, that the statute did not go the length of the rebellious convention in the year 1649, when it declared patronage an evil and “a bondage, under which the Lord’s people and ministers of this land have long groaned, and that it hath no warrant in God’s word, but is founded only in the canon law, and is a custom popish, and brought into the kirk in times of ignorance and superstition, and that the same is contrary to the Second Book of Discipline, in which, upon solid and good ground, it is reckoned among abuses that are desired to be reformed, and unto several acts of General Assemblies, and that it is prejudicial to the liberty of the people.” Indeed, it is not a little singular, that while the church insisted for the abolition of patronage at this period, it did not venture to ask parliament to acknowledge the Second Book of Discipline, or the Book of the Directory, or to revive, either by inference or implication, what had been maintained by the General Assemblies and conventions in the time of the great rebellion. And by the bye, it is well worthy of remark, that while the rescinded act 1649 mentions the claims set up in opposition to patronage by the Second Book of Discipline, it does not allege that those claims had ever been recognised and admitted, or that they had suffered from subsequent usurpation, or illegal contraction, through the exercise of the right of patronage, subsequent to the statute 1592. On the contrary, it plainly adverts to it as a claim maintained but resisted, for which it says, no doubt, there was no warrant in the word of God, but which it does not say was ever part and parcel of the law of the church or the state.

And here, before leaving the consideration of those two statutes, I must take leave to observe, that if the remedy which has now been applied by the General Assembly was a fundamental law of the Church, or which it was in the power of the church courts "to extend to the Lord's people and ministers," it is not very easy to discover what was the "evil and the bondage" under which they groaned." For if the people had a right, as often as a person was presented to reject him, or if the Assembly had a right to confer that privilege upon them, it is beyond my power to discover how patronage could either have been an abuse or a grievance. It is most manifestly clear to my mind, that it could have been neither the one nor the other, and that the very declaration of the repealed statute 1649, and the resistance to patronage in the year 1690, with the enactments, chapters 3 and 25, afford sufficient evidence that no such power was understood or pretended to have resided in the Church, while the right exercised by the patrons was one utterly independent either of the consent or the negative of the people.

But indeed, if your Lordships will only recollect the evidence which is afforded of the resistance made by King William to the passing of those two statutes referred to by my brother Gillies, and clearly established by the evidence to be found in the Life of Carstairs, and the anxiety which he exhibited to maintain the rights of the patrons, I think it is impossible to doubt that it never was imagined that any power resided in the Church of itself, to remove the grievance of which it was complaining; and that, without entering into a struggle with our great and immortal deliverer, unquestionably one of the best and greatest men who ever occupied a throne, in the palmy days of his highest popularity, the ecclesiastical judicatories themselves would have adopted that remedy, which it was left for the ingenuity of these later times to discover it was within their own power to apply.

Be all this, however, as it may, patronage continued abolished till the act of the 10th of Queen Anne was passed, to restore patrons to their *ancient* rights of presenting ministers, &c. And it seems to me a most material element, in considering the present question, as to how far the power of interference with the right which was then restored, was left with the Church, if it ever existed, which I am clear it never did, to consider attentively the plan of enactment on which the legislature proceeded, as well as the actual terms and structure of the statute.

In the first place, the legislature did not in express terms revive those portions of the statutes 1592 and 1567, which had *not* been re-enacted by the act 1690, after being repealed in the year 1661; and I see no ground for holding, that it is to be held that this was done by implication. Indeed I am not aware of any in-

stance in which statutes have been held to have been revived by implication, after having been solemnly repealed ; though perhaps, if a right has been restored, which could not be rendered effectual, without the application of means conferred by a statute so situated, it might be contended to have been within the view of the legislature, also to revive the process conferred by the preceding statute. But I can figure no reason for any such implication, where the statute restoring the right does in itself bestow the means and construct the machinery by the exercise of which its efficiency has been sufficiently provided for.

In the present case, had the legislature revived the provisions of the statute 1592, respecting the presentations of laick patrons, without many explanations and additions, in themselves inconvenient, and which might have been offensive to the prejudices of the judicatories of the Church at the time, it would have left questions open, in settling which great difficulties would have arisen, seeing the extent of the claims set up in the Second Book of Discipline, in the Book of the Directory, and in the conventions and assemblies held during the great rebellion ; as well as by the Church itself during the time that had elapsed between the years 1690 and 1711. The legislature, accordingly, merely did not even recognise patronage, as acknowledged by the Church, under these preceding statutes. On the contrary, as I read the enactments, it confined its recognition in the statute 1711, to two periods, the one of remote antiquity, the other comprehending the time during which Presbytery was established, from 1592 till 1606, and to the other, when, from 1612 to 1690, episcopacy was the sole and exclusive religion of the state.

In the first place, it declares, “ that by the *ANCIENT laws and constitutions* of that part of Great Britain called Scotland, the “ presenting of ministers did of right belong to the patrons ;” and secondly, it declares that this right *CONTINUED*, “ until, by “ the 23d act of the 2d S. of the late King William and Queen “ Mary, held 1690, entituled, an ‘ Act Concerning Patronages,’ “ *the presentation* was taken from the patrons and given to the “ heritors and elders.” Now, it is plainly manifest to me, that the legislature here was not contemplating the right of patronage about to be bestowed, merely as it had existed in the times of presbytery, but as it had been vested in patrons in remote antiquity in the times of popery—in the times after the authority of the pope was first abolished, when the right of admission first lay with the bishops, and afterwards with the superintendents—and afterwards as it was exercised during the times of prelacy, from the year 1606 to 1690. In the year 1711, the words, “ *ancient laws and constitutions*,” were quite inapplicable to statutes passed in the end of the sixteenth century, little more than 100 years preceding that in which the legislature were then sitting.

In the same way, as it would be an abuse of terms for us to talk of the statute 1711 itself, as an ancient law and constitution of the realm. And with respect to the recognition of the exercise of patronage during the seventeenth century, as being directly and more immediately in the contemplation of the legislature, the words of the statute are precise and specific. It resided in the patrons, says the statute, UNTIL it was taken from them by the act 1690. The statute even lays aside those prosperous days of the Church, from 1637 and 1649, to 1661 as having been *no legal* interruption of the rights of patronage.

Now, your Lordships will observe, that the right of patronage, as enjoyed under the ancient laws and constitutions of the realm, and while episcopacy continued as the religion of the state, was a right, to the exercise of which, no legal or effectual opposition could be made, in any quarter. Upon receiving the presentation, the Ordinary was bound to serve an edict in favour of the presentee, at the benefice, and at the end of nine days, if no relevant objection was stated, of which the bishop, in the first instance, and the archbishop in the second, was to take cognizance, he was bound and astricted, and required to give an induction into the benefice. He could call upon no third party either to assent or dissent, or to negative the nomination of the patron, and if the common law of the Popish Church of Scotland was the same as it appears to have been in England, and I see no reason or authority for doubting it, down to the days of Edward I., when the remedies competent to the lay patrons were enlarged and extended, the lay patron must have had the power of calling in the authority of the civil courts to compel the Ordinary to do his duty, and give effect to the presentation. And during the years that elapsed between 1612 and 1660, we see that corresponding remedies were actually conferred upon the patrons in the different enactments recognising and confirming their rights, by directing those, who then exercised many of those powers now competent to this Court, viz. the Lords of the Privy Council, to issue letters of horning to that effect. Even during the short time that presbytery existed under the statute 1592, your Lordships have seen, that *as a condition of their own establishment*, while the presbytery had the power of examination, as conferred by the act 1567, c. 7, they were bound and astricted to receive and admit whatsoever qualified person should be presented by the lay patrons.

In this situation, the legislature in the year 1711, must be held as having contemplated the rights of patronage, which they were restoring, as subject to no limitation, control, or negative in its exercise, except such as it might have been competently exposed to during the periods to which I have referred. Such being the case, observe what is the first step taken by the legislature for

restoring and rendering effectual the rights which had thus been suspended. Having declared that the way of calling ministers by the statute 1690, chapter 23, has proved "inconvenient, and has "not only occasioned great heats and divisions among those, who, "by the foresaid act were entitled and authorized TO CALL ministers," it proceeds to repeal the said act, in so far as the same relates to the *calling* of ministers by heritors and others therein mentioned, and the same was repealed and made void.

The effect of this provision, your Lordships will observe, was the avoiding that part of the statute 1690, chap. 23, where it left, first, to the heritors and elders to propose a person to the congregation; second, where it conferred upon the congregation the right to approve or disapprove of the person so proposed to them; third, where it required of the disapprovers to give in their reasons to the presbytery, by whom the affair should be cognosed and concluded; and fourth, where it declares, that if an application was not made by the heritors and elders for the call and choice of a minister within six months, the presbytery itself should provide and plant a minister.

Having thus cleared the way from all control upon the part of the heritors and elders, and of all right of approval or disapproval on the part of the congregation, which in fact was a thing totally inconsistent with, and contradictory to, the right then restored to the patron, and which, as it had required that statute to confer it upon them, was now exactly as if it never had existed,—the statute proceeded to declare, that the right of all and every patron or patrons (that is, the right as it stood in the ancient laws and constitutions of the realm, and until repealed by the act 1690, chap. 23,) to the presentation of ministers to churches and benefices, and the disposing, &c. be restored, settled, and confirmed to them, the aforesaid acts, or any other acts, *statute, or custom to the contrary*, in any ways notwithstanding. It therefore abolished, to all intents and purposes, all right of *call* wherever it might reside, if it were "*a custom*" contrary to the free and unlimited right of patronage, as residing in the ancient patrons. The statute then declares the right of patrons to present a qualified minister; and at the same time, it expressly enacts, that the presbytery of the respective bounds, "shall, and is hereby "obliged to receive and admit in the same manner such qualified "person or persons, minister or ministers, as shall be presented "by the respective patrons, as the person or ministers presented "before the making of this act ought to have been admitted."

In this way, your Lordships will see, that while the legislature required the presbyteries to admit such qualified persons as might be presented by the patrons, as fully and effectually as their predecessors the bishops must have admitted the presentees of laick

patrons, or as they themselves must have done persons elected by the heritors and elders, and consented to by the congregation, it left the rights of the patrons as free and unencumbered by the act 1690, or any other statute, act, or custom to the contrary, as the same could have been exercised by their predecessors during the long period when patronage existed down till the year 1690.

Under all these considerations, I submit it to your Lordships as clear, that the right of patronage, as restored by the statute of the 10th of Queen Anne, was one subject to no control whatsoever, except such control as it was subjected to in popish and episcopal times, or under presbytery as established by the act 1592, with the power of examination conferred upon the church by that part of the statute 1567, chap. 7, which did not fall under the *virtual* repeal by the statute 1592, or the non-renewal of the act 1690, as a portion of the said statute 1592, relating to patronage. It seems to me to be as clear as any proposition can possibly be, that the act 1711, having annulled and repealed every thing in the act 1690, chap. 23, with respect to the "calling of ministers," which had "created heats, and proved inconvenient," put an end to all power on the part of the church to confer, (had such previously existed) or of any part of congregations to require, the privilege either to consent to, or to negative the right of the presentee. And I put it to your Lordships, whether the right, which was here restored to patrons, being clearly and manifestly a civil right *conferred upon them by their investments*, and, by the structure of the statute made independent of every control whatsoever, except that of a qualified person being nominated, whose qualifications were to be judged of by the church, and by the church alone, upon examination, it is possible for us to find, that it was in the power of that church, either by renewing the right of assent or dissent which the legislature itself had abolished, or upon any pretence whatsoever, to have limited that right still farther, by giving to the congregation, or a portion of the congregation, a power of avoiding the presentation altogether, and of annulling the right of patronage by the interposition of an absolute negative on its exercise, which, at none of the periods of the church which were in the contemplation of the legislature, ever had been recognised or acknowledged?

Your Lordships heard yesterday, that in the case of Kiltartie, it had been solemnly adjudged, that no part of the congregation of a parish had a right to object to a presentation; and without detaining your Lordships by examining the particulars of that case, it seems to me decisive of the question, whether a power was vested in the church of conferring upon a congregation, or a portion of a congregation, not merely the right of questioning the legality of the act of presentation in the first instance, but actually of rejecting the presentation itself, after it had been

legally made and accepted. This, I am bound to hold, was known to be the law of the church in 1711; and I will just put the case, that in the General Assembly 1713, that proceeding of the year 1834 had been adopted, which, by having been made the foundation of the rejection of the patron's presentation, is now legitimately brought under our consideration, could it have been doubted, that it must have been regarded as one, having for its direct and immediate object, to render abortive the enactment of the legislature? But further still, can your Lordships doubt, that considering the vehement opposition which the statute 1711 met with,—the persevering animosity which was manifested against it throughout the whole Church of Scotland; this remedy, supposed to be within their own competency, would not have been brought forward to abate the grievance, had such a power been understood to exist? And yet, what is the fact? Although we find petitions to parliament for a repeal of the statute, and struggle after struggle entered into for resisting the enactment of the statute, we never find any such right, not merely boldly maintained or resolutely persisted in, but even hinted at as within the powers of the church, whether judiciary or legislative. No doubt, we do find, that on many occasions rights of patronage were, after the year 1711, not exerted. But this arose partly from many of the lay patrons being disqualified as non-jurors, and from the crown and others feeling an interest not to create dissension, particularly at a period when so much depended with reference to the stability of the government and the rights of property, on conciliating all conditions of the people, and particularly those connected with the Presbyterian Church, on whose loyalty and affection the protestant succession, at least in Scotland, so exclusively rested. But also it arose, I believe, from the licentiates of the church, preferring with the consent of the patrons to be brought in by a call at large, rather than on presentations which were so unpopular.

In like manner we find from the operations of this conduct of the patrons much usurpation by the judicatories of the church.

But for my own part, I care very little, judging of this question as a question of law, for claims subsequent to the statute 1711, set up by the church, or countenanced by the proceedings of its judicatories, in determining the extent of their ecclesiastical power, to interfere with a positive enactment of the legislature, conferring, either upon lay patrons or others, the *civil right of patronage*, or any other civil right whatsoever. I should have done this, even if I had found the proceedings of the church all tending in one course, from the year 1711, down to the present hour. But the extraordinary position in which the defenders stand is, that with a course of practice, uninterrupted for a period of nearly eighty years, directly in the teeth of the preten-

sion on which this act of Assembly is founded, we are called upon to view the whole of that practice as arising from the gross usurpation of a dominant party in the church, who, disregarding its constitution, set its laws, and rights, and privileges at defiance, and inducted its clergy in opposition alike to the rights of the church and the rights of its congregations. And all this, it is said, was owing to the undue influence of Dr. Robertson.

Now, I had intended troubling your Lordships with some observations on this matter, but I will not venture to add a word to what was so powerfully and unanswerably stated by Lord Gillies upon the duty of adhering in all judicial questions to the authority of a series *rerum judicatarum*. His Lordship's remarks upon this part of the case I adopt to the letter; and I shall only add, in point of fact, that I do not believe what is alleged with respect to the influence of Dr. Robertson. Leaders of parties in general, and I believe in our church in particular, are but the organs of their followers. By the exercise of their own talent, they may no doubt contrive to get them, with more or less facility, to pursue any precise object, or one course of policy; but their influence goes little further; and I firmly believe, that the power of Dr. Robertson and others had its origin in those more enlightened views of the true rights and privileges of the church, which gradually developed themselves, from before the middle of the eighteenth century, in the proceedings of the General Assembly, in opposition to the enthusiastic and bigotted notions prevailing in some sections of the church, and which had been handed down to them from the days of Melville, though rejected by the legislature in the statute 1592,—which again burst out at the time when the Secession took place about 1736, and carried off the more strenuous adherents of these antiquated pretensions, which were destined to remain in abeyance till the enlightened days of the year 1834.

In this situation, considering the terms of the statute of the 10th of Anne to be clear and unambiguous, and that the more recent practice of the church has unquestionably been confirmatory of the views which have presented themselves to my mind upon the subject, I could not have listened to the intervening assumptions of the church during its struggles to get free of patronage altogether, even had they been uniform, not contradictory of each other, and supported by no opposite practice and exercise of right upon the part of those whose interest it was to enforce the provisions of the statute.

But it has already been pointed out to your Lordships, that the fact is entirely different, and the course of practice entirely the reverse. You have first the case Auchtermuchty, and then

the case of Lord Dundas, at the distance of sixty years thereafter, clearly and distinctly establishing, that there was no power permitted to be exercised by the church courts to interfere with the right of the laick patron, without the power of the civil court being called in to restrain and defeat it. It is impossible for me, therefore, to hold, that there was any usage or power in the church to limit or restrict the civil rights of patronage, if exercised, as restored by the act 1712, under either one pretence or another.

III. But the legality of the measure in question has been supported upon another principle. It is said, as I understand, that laying out of view the precise enactments of the legislature, and the actual powers exercised by the church in the matter of patronage, there resides in the General Assembly of the church, a power of general legislation in all matters connected with its interests, sufficient to sanction this enactment, independent alike of its usage and its customs; and it is said, that this legislative privilege, if exercised, it is beyond the power of any authority of the state to limit or control. I say, any authority of the state, because I have already shewn, that if the legislature itself does possess that power, this Court, as the organ of the legislature, and the only means by which its enactments can be enforced or rendered effectual, must, if the law proves that any of the acts of the church are beyond its constitutional powers, and the result of an usurpation of civil authority, make them the subject of control and restraint. That a power of legislation exists in the church to a certain extent, no one can possibly deny. Its General Assemblies are authorised by the Confession of Faith, *which forms part of the statute law of the land*, “to determine controversies of faith, and “cases of conscience—to set down rules and directions for the “better worship of God, and the government of his church—to “receive complaints in cases of mal-administration, and authorita- “tively to determine the same.” But these are all the powers which, in the Confession of Faith, the church lays claim to, in any part of this, which it required the legislature, in the year 1690, to recognise as the charter of its rights, and as exhibiting the extent of its legal powers. It did not pretend to a right to repeal the statutes of the legislature generally—nay, it did not lay claim to repeal such, even should the legislature interfere with those functions which are here more particularly devolved upon the church; and which had been sanctioned as within its just and legal prerogative; and the Assemblies are, in direct terms, more particularly debarred, by these articles of faith which I have said form the recognised law of the state, from handling or concluding any thing but that which is *ecclesiastical*, and are not to intermeddle

with civil affairs. And your Lordships are aware, that in defining the power of the civil magistrate, it is most anxiously and particularly provided, that the church shall be effectually excluded from intermeddling with any of the civil rights of the state.

In like manner, in the statute 1592, I can find no sanction for appealing to any power of legislation derogatory to or subversive of any of the municipal and legislative enactments of parliament, or of the civil rights of the people. And holding the church to be but the creature of the law, and that every power which it possesses is derived from the law, it must follow as a necessary consequence, that if those powers of regulating its own affairs, which it has nicknamed a power of legislation, are exceeded, the church, like every other body of temporal creation, must in the exercise of its temporal powers, whether of adjudication, or alleged legislation, be subject to the control of the civil magistrate represented by your Lordships.

But if this power is not to be found as conferred, or even recognised in the acts of Parliament to which I have referred, or in any other which I am aware of, I am altogether at a loss to discover where I am to find it. Surely we are not to go back to the Second Book of Discipline, where it was asserted that the church "had power to abolish all statutes and ordinances, (whether legislative or not it does not say, but it comprehends both), concerning ecclesiastical matters that are found noisome and unprofitable, and agree not with the time, OR ARE ABUSED *by the people*,"—a provision which was most surely disallowed by the legislature in 1592, and which, if granted, would have been totally inconsistent with the existence of civil society. Surely we are not to go back to the proceedings of those Assemblies held in virtue of statutes which themselves have been abrogated, and whose proceedings have shared the same fate as that of the authorities under which they were held. We surely cannot discover what are the legitimate powers of the General Assembly by looking to those which it laid claim to, when, sometime between the year 1633 and 1646, it assumed the power of declaring war against the king and his lieutenant, if either the one or the other should presume to enter the kingdom under the pretence of maintaining the authority of the crown and of the law, or of protecting the religion and the liberties of the people. At that time, no doubt, it did exert legislative powers. It also assumed the power of the executive, called on the people to arm, and even required them to enter into open rebellion. Neither can we look for authority to discover the rights of the Assembly, in those times when Episcopacy was established, and no legal Assembly, as connected with the civil institutions of the realm, could be held. But if it were competent for *us* to look to any thing but the *existing* laws of the state in determin-

ing this claim put forward in behalf of the church, I would refer your Lordships to the abrogated statutes from 1640 downwards, during the time of the great rebellion, and more particularly the statutes 1645 and 1649, by the first of which, the Book of the Directory, (11th August 1645), was ordered to be practised, not under authority of the General Assembly, or in virtue of any legislative powers belonging to it, but in virtue of the powers of the legislature itself, then supposed to reside in the usurping Parliament. And here allow me to observe, that this statute having been repealed, the authority of the Directory, as forming a law of the church, as an establishment, must be held to have fallen along with it. In connection with the state, that book had no authority but what it derived from the usurping legislature. The statute affords conclusive evidence, however, that the church held that without the interposition of the legislature the Book of the Directory was, as a code of its laws, not worth the paper on which it was written. I have said that by the act 1661, the proceedings of the pretended legislature were themselves annulled. Whether the church judicatories have or have not since recognised the provisions therein to be found as portions of their constitution, I care not. I cannot, when called upon to interpret the statute law of the realm, consent to recognise them as entitled to receive from us any regard whatsoever. Whether, as connected with its mere spiritual jurisdiction, the Book of Directory and its provisions is acknowledged as a binding authority, I cannot know sitting here, and I am not bound to inquire. It may, for aught we can know, or have any thing to do with, have done so formerly, and may do so now. We are not inquiring into the spiritual laws of the church. We have only a right to apply the civil laws of the state; and it humbly seems to me, that much confusion has been introduced into this argument by confounding these two together, which are totally separate and distinct.

But upon this subject I would also refer to the rescinded statute 1649, with its various enactments, legalizing certain powers claimed by the church, and authorising certain enactments to be made by the church, all of which would have been of themselves legal without the intervention of Parliament, had it ever entered into the imagination either of Parliament or the Assembly that a power of legislation had resided in the latter. Nay, it is not unworthy of notice, that while the presbytery of Auchterarder has, under the usurped authority of the General Assembly, *refused to take upon trial the presentee* of a patron, not alleged to be disqualified, duly presented, and even having a call from the congregation, the church in 1649 felt that they were not at liberty, without the authority of Parliament itself, to adopt such a measure; and accordingly it was specially enacted, that it was

“lawful for presbyteries thereafter to refuse *to admit any to trials upon presentation from a lay patron.*”

But indeed, why should we look farther than to the statutes passed in the years 1560, 1567, 1592, 1690, and 1712, for conclusive evidence upon this subject? For if the power of legislation upon all these matters was vested in the church, independent of Parliament, and without being subject to its authority, what occasion was there for all those enactments which, in order to render the provisions contained in them effectual, were thought to require the recognition of positive statute by the three estates of the realm?

In short, taking every thing into view, it appears to me that the measure in question has no sanction from any of the statutes by which the church was created a branch of the Establishment of the realm; neither do I think that it has any support in the customs, usages, and recognised discipline of the church itself. And here, my Lords, I will relieve your Lordships from the fatigue of listening to the views which had occurred to me as to the absurdity of supposing such a power as that in question to reside in an assembly so constituted as the General Assembly, as contrasted with the powers vested in the two branches of British legislation, Lords and Commons, independent of the sovereign; for the remarks made by Lord Gillies upon this part of the case seem to me to have been so admirably stated, and to have been so conclusive, that concurring in every one of them, I have determined to leave that part of the subject altogether untouched.

But, 2dly, The act of Assembly, having no reference to the exercise of any spiritual right of the church, but being a direct limitation upon the civil rights of patronage, and to all intents and purposes rendering the exercise of them dependent not upon the only condition required by the statute of presenting a qualified person; but upon that of presenting a person who should not be negatived by the congregation, I think it was a direct interference with the province of the civil authorities, and equally beyond the competency and the power of the church to enact. Indeed, if the view which I have taken of the obligation of collation imposed on the church, as altogether separate and distinct from the right of ordination, which exclusively belongs to it, be correct, the measure in question can have reference only to that which regards the civil ceremony of induction into the benefice, the same as that belonging to the ordinary in times of popery, who was no more liable to be controlled in conferring ordination, than the Presbyterian Church of Scotland, and yet could be compelled to induct a qualified presentee into this benefice by the power of the civil magistrate. And, my Lords, for the reasons I have already stated, I cannot discover how it can be maintained in behalf of

the church, that this act of Assembly can have reference to its spiritual function of ordination ; because by its own fundamental laws, the power of ordination alone is competent to its members, in virtue of the spiritual authority committed to that body by the great and invisible Head of the church, which it neither can delegate nor suffer to be controlled by any external or temporal power whatsoever. And therefore it is impossible for the church to maintain justly, that by the act authorising this power of dissent, they gave to congregations a power to control that which the church held as a trust, sacred and uncontrollable by any temporal power in the state, whether vested in its magistrates or in the body of the people.

But separately from these considerations, I have to submit to your Lordships, that if the act of collation is to be deemed one partly spiritual and partly temporal, with which it was within the original power of the church to deal and to modify, and that calls fell within that power, such power is now effectually excluded by the terms and provisions of the statute 1711.

By the statute 1690, as I read it, and as indeed is sufficiently explained by subsequent practice, by calls to ministers were meant the opportunities which were afforded to congregations to assent or dissent from the nomination of the person submitted to them for their approbation by the heritors and elders of the parishes respectively. But even that right was limited to a power of disapproval upon cause shewn. But the statute 1711, upon the ground of the heats and dissensions which the exercise of these rights had created, in direct and explicit terms, abolished both the right of nomination and the power of assenting or dissenting as to the person nominated. In short, it abolished, what to all intents and purposes were then understood to be "Calls," as a law of the church ; and even if such had been an original right vested in congregations by law, which I am satisfied it was not, after presbytery was established as a part of the State, I think it was finally and effectually taken away by the repeal of the act 1690, chap. 23.

I have now submitted to your Lordships every thing which I deem it incumbent upon me to add to that which has been already stated by your Lordships who have delivered your judgments, and which seems to me to afford in addition, sufficient grounds for granting that decree of declarator, which the pursuers have required of us to pronounce. I have omitted to take notice, no doubt, of some points in the case which were rested upon by the pursuers as well as the defenders, and for this reason, that neither party seemed to me to consider them as of much importance to the real merits of the question before us. Among these, is the supposed acquiescence on the part of the pursuers, in the proceedings of the presbytery, in so far as

controlled by the act of Assembly 1834, and some informalities alleged to exist in the form of the action. None of these exceptions seem to me to be well-founded. If there was any thing in the latter, it was the duty of the Lord Ordinary in the Outer-House to have adverted to it, and we should have had the point discussed in the shape of a preliminary objection. With regard to the former, it seems to me to be founded upon a ground opposed to the plainest and most elementary principles of law. Litigants may admit matters of fact, and are bound by their admission ; but no party is bound by an admission in point of law ; and yet the supposed admission of the pursuers is confined to one depending altogether on the legality of the enactment of the Assembly.

In this situation, I think it unnecessary for me to trouble your Lordships with farther observations. I shall only therefore remark, in conclusion, that though I most deeply regret the agitation of the present question—though I foresee much danger to the tranquillity of the country, and the stability of the Church, from the inconsiderate proceedings which have given rise to it—I utterly disregard those threats, which if not directly uttered, have at least been insinuated, as to the Church judicatories disregarding or resisting the authority of your Lordships. No man, nor any body of men, however elevated, have ever yet resisted the law with impunity. We have seen that both Houses of Parliament, the Lords and the Commons of England, having found the arm of the law too powerful for their resistance, were compelled to yield to its omnipotence—and I cannot say that I have much apprehension of all that the General Assembly could do in such a case, under whatever leaders she may think fit to proceed to battle.

Were that body, however, to be so ill advised as to raise their banner of resistance to the law of the land, I would humbly remind the Church, that the party which must suffer from a warfare of that description, can be no other than itself. The Church has great and spiritual power ; and with the exercise of that it is not our wish, nor our province, to interfere. But if any party in the Church, taking too elevated a view of its functions and its prerogatives, renounce the obligations incumbent upon it as an establishment of the State, the members of that faction must just submit, as their predecessors have done before them, or yield up their benefices to those who adhere to the principles on which the Church was recognised as an Establishment, and by the acknowledgment of which they themselves enjoy any right to the privileges they possess. This unfortunate result overtook many most excellent, but misguided men, at the time when the Secession took place ; and the utmost

evil that would occur by the preposterous resistance which has been threatened now, would in all probability be attended with no greater injury, either to the religion or the morals of the country than what followed upon that occurrence.

But I have no fear that the Church, or a majority of its members, will adopt any proceeding of so unwise and unfortunate a description. I do not say one contrary to their own interest, in a temporal point of view, because I do not entertain a doubt, that in all their deliberations upon this subject, the question of personal interest will never influence their conduct; but I trust that, now that the excitement of the day has gone by, and when the subject has been calmly and deliberately canvassed and considered, they will come to think with Dr. Robertson, that the people are not the most competent judges of those qualities which a minister should possess, in order to be a useful teacher either of the doctrines of pure religion, or of the precepts of sound morality, and that they themselves would betray their duty to the constitution, were they to continue to foster in the minds of the people, the false idea that they have the privilege of choosing their own ministers; or of rendering the right of patronage ineffectual, by imposing a negative upon the presentee nominated by the patron.

Upon the whole, I am for repelling the defences to the declaratory conclusions of the libel, and decerning in favour of the pursuers.

Thursday, March 1.

THE LORD PRESIDENT.—“ LORD MACKENZIE.”

LORD MACKENZIE.—My Lord President, As I understand myself to be called on to state explicitly the reasons of my opinion, I shall endeavour to do so as briefly as I can, abstaining from anything like preface, and from all observations which I do not think strictly form grounds of decision of the cause.

The facts of this case I think are shortly these :—The General Assembly made an act, providing in substance, so far as relates to this case, that when a presentation shall be made to any vacant parish, the presbytery shall, before receiving the presentee on trial, take measures to ascertain whether a majority of the male heads of families in the parish dissent from the nomination of the presentee or not. And if they do not dissent, the presbytery shall sustain the call, and proceed to the trial; but if they do dissent, then the presbytery shall reject the presentation without any trial. And it further provides, that unless the patron shall, within six months, make a presentation, which shall not be so dissented from, the presbytery shall themselves present *jure devoluto*. Under this act of Assembly, Lord Kinnoull, being patron of the Church of Auchterarder, and a vacancy of that church having occurred, gave a presentation to Mr. Young, a licentiate of the Church, who laid it before the presbytery of Auchterarder. The presbytery thereupon did not sustain the presentation simply, but only to the effect of adopting measures for ascertaining whether this nomination was dissented from or not; and having ascertained that it was dissented from, they rejected the presentation, without further procedure, and that expressly as acting under the authority, and in execution of the act of Assembly.

On this, Lord Kinnoull and Mr. Young raised the present action in this Court against the presbytery, the collectors of the Widows' Fund, and the heritors of the parish, concluding to have it declared; 1st, That the presentation was valid; 2d, That the presbytery were bound in law to have made trial of the qualifications of the presentee; and if by them found qualified, to have admitted him minister of Auchterarder; 3d, That the rejection of the presentation, on account of the dissent or *veto* of parishioners, was illegal, and contrary to patrimonial right. Such are the primary conclusions, the conclusions which in the present debate have been insisted in. The secondary are, that *this being de-*

clared, it ought to be found, if the presbytery persevered in their rejection, that Mr. Young had right to the stipend, manse, and glebe, and other emoluments of the Church, during his life; and that the collector of the Widows' Fund had no right to the said stipend; and the heritors ought to be ordained to pay the stipend to Mr. Young, in terms of the last locality: Or otherwise, that the patron, the Earl of Kinnoull, had right to retain the stipend and emoluments, during the life of Mr. Young, and that decree against the collectors of the Widows' Fund and the heritors should pass in his favour as patron.

The presbytery appeared as defenders, and have pleaded in substance, (1.) That this Court have no jurisdiction in such a cause; (2.) That the pursuers have no right to make the presbytery defenders in such an action; (3.) That the presbytery did no wrong, and should be assolizied on the merits.

The most formal way of discussing the questions arising in such a cause, is perhaps to determine first those of jurisdiction and competency. But the most convenient for clearness and brevity, seems to me to be, to consider *first*, whether there appears to have been a wrong done by the presbytery; and if so, whether it can be remedied by the jurisdiction and form of action to which the pursuers have had recourse.

I. On the first question then, I have to observe, that lay patronage I understand to be a patrimonial right of naming a person who is by the Church to be admitted to a vacant benefice and office therein. This right of naming or calling an individual, I understand to be subject only to this limitation, that the presentation shall be made within a certain time, and the presentee shall be a person who is qualified to hold the office, the choice among the number of qualified persons being entirely in the patron. That such was the nature of patronage before the Reformation seems not to be disputed. It is sufficient, therefore, on this subject to refer to Balfour, who wrote immediately before the Reformation, and who says, p. 501,—“ Ane laique patron of ony
“ kirk or benefice vaikand sould present thairto ane qualifyit and
“ habil persoun, of sufficient literature, honest in life, and of good
“ maneris, within four monthes; the quhilk gif he failyis to do,
“ he be his lang delay, in his awin default, prejudgis himself
“ anent his richt of presentation, swa that the bischop, *jure di-*
“ *volut*o thairefter, has richt to present ony qualifyit persoun
“ to the samin kirk and benefice.” Nor am I aware of any other definition of patronage any where to be found. But if it ever was so, I see no legal authority making it otherwise, and mixing the choice, either express or implied, of any other person or persons with that of the patron, as necessary to form the title of the particular qualified person having right to claim from the

Church admission to the office and benefice. The reformed Church in Scotland were indeed opposed to lay-patronage altogether; and in both Books of Discipline it was proposed to be excluded. But that the Legislature of Scotland did not sanction. I need not tell your Lordships, that the aristocracy, the prevalent party of Scotland, were very little inclined to yield their patrimonial interests, to please the Church. Accordingly, you have heard from the Lord Justice-Clerk, that the Church abandoned every claim beyond that of examination and ordination, fully admitting that patronage must not be trenched on. And the statute 1567 expressly provides, that while the *examination* and *admission* of ministers shall be only in the power of the Kirk, yet this shall be under the provision—"the presentation of laick patronages" alwaies reserved to the just and auncient patrones." And the statute goes on to provide, "That the patroun present ane qualified persoun, within sex monthes, (after it may come to his knowledge, of the decease of him quha bruiked the benefice of before)." And it was on his failure to do this only, that any right is given to any other party to interfere. It is true, that a provision is made for the case, that the patron should present a person whom he believed to be qualified, but whom the superintendent should refuse to admit. I shall afterwards consider it in reference to the question of jurisdiction. But in the question of right, this at least I take it to be quite clear, that it was not intended to give the Church the right of rejecting the presentee, though qualified, merely because the Church, or any persons authorised by it, disliked the presentation. The legislature would have stultified itself, if, knowing the aversion of the Church to lay patronage, it had, in one paragraph, reserved the rights of the ancient patrons, and in the next authorised the church to reject presentations at its own pleasure; or, what is the same thing, to reject them, unless the nomination of the patron should be concurred in expressly, or by implication, by the Church itself, or some body of persons authorised by it for the purpose. I cannot have the least doubt that the meaning of this statute was only to authorise the superintendent and other ecclesiastical bodies, truly exercising their own function of examination, to reject the presentee, if by them on trial found not qualified.

I am confirmed in this view by another statute, passed only a few years after, viz., 1581, ch. 102, in these words: "Item, it is statute and ordained be our Sovereine Lord, with advise of this present parliament, that all benefices of cure under prelacies, sall be presented be our Sovereine Lord, and the laick patrons, in the favour of abill and qualified ministeris, apt and willing to enter in that function, and to discharge the dewtie their of: And in case ony sall happen to be given and dispo-

“ed utherwise heirafter, decernis and declairis the giftes and dis-
 “positiones to be null, and of none avail, force, nor effect.” Does not this clearly infer, that if they were disposed to qualified persons, who would accept, they were not to be null, and certainly not to be annulled by the pleasure of the Church? This act was never, so far as I see, repealed.

If such be the sound interpretation of the statute 1567, it left the right in patrons, of choosing an individual out of the number of qualified persons, as entire as ever it had been. Then this right was again fully established by the act 1592, ch. 116, where it is provided: “Therefore ordainis all presentations to benefices, to be
 “directed to the particular presbyteries, in all time cumming;
 “with power to give collation thereupon: and to put ordour to
 “all matters and causes ecclesiasticall, within their boundes, according to the discipline of the Kirk: providing the foresaids
 “presbyteries be bound and astricted to receive and admitt quhat-
 “sumever qualified minister presented be his majesty, or laick
 “patrones.” So by 1592, ch. 117, it is provided, that “in case
 “the presbytery refuses to admit ony qualified minister, presented to them by the patrone, it sall be lauchfull to the patrone
 “to reteine the heill fruities of the said benefice in his awin
 “hands.” These statutes are perfectly clear, and serve, if it were necessary, to show the meaning of the former statute 1567. No power is given to reject any presentee, if qualified; and if any qualified man was rejected, no matter on what ground, the fruits of the benefice were to be retained.

Under these statutes, then, lay patronage remained, except while episcopacy prevailed. It is not pretended that the bishop had any power of rejecting a presentee on any ground, except his want of qualification. Passing over the Usurpation, (of which the statutes were rescinded) and the time of episcopacy, after the Restoration, we find presbytery restored, and the act 1592 revived at the Revolution. But it was at that time intended to abolish lay patronage; and therefore the statute 1690, ch. 5. provided, that the said statute was revived “in the whole
 “heads thereof, except that part of it relating to patronage,
 “which is hereafter to be taken into consideration.” And this was followed by the statute 1690, ch. 23, which abolished patronage, so far as related to the presentation of ministers, and provided, “that in case of the vacancy of any
 “Church, and for supplying the same with a minister, the heritors of the said parish, being protestants, and the elders, are to
 “name and propose the person to the whole congregation, to be
 “either approven or disapproven by them, and if they disapprove, that the disapprovers give in their reasons, to the effect
 “the affair may be cognosed upon by the presbytery of the

“ bounds, at whose judgment, and by whose determination, the
“ calling and entry of a particular minister is to be ordered
“ and concluded.”

But this statute was repealed, so far as relates to the presentation of ministers, by the act 10th Queen Anne, c. 12, which provided “ That the foresaid act 1690, entitled Act concerning patronages, in so far as the same relates to the presentation of ministers by heritors and others therein mentioned, be and is hereby repealed, and made void. And that, in all time coming, the right of all and every patron or patrons to the presentation of ministers to churches and benefices, and the disposing of the vacant stipends for pious uses within the parish, be restored, settled, and confirmed to them, the aforesaid act, or any other act, statute, or custom to the contrary in anywise notwithstanding.”

And it afterwards provides, “ that, from and after the 1st of May 1712, it shall and may be lawful for her majesty, her heirs, and successors, and for every other person or persons, who have right to any patronage or patronages of any churches whatsoever, in that part of Great Britain called Scotland, (and who have not made and subscribed a formal renunciation thereof under their hands,) to present a qualified minister or ministers to any church or churches whereof they are patrons, which shall, after the 1st day of May, happen to be vacant; and the presbytery of the respective bounds shall be, and is hereby obliged to receive and admit in the same manner, such qualified person or persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers presented before the making of this act, ought to have been admitted.”

It has been argued, that these words imply that the presentees of the restored patrons were to come in place of the persons named or proposed by the heritors and elders under the act 1690, *i. e.* that they were, before being admitted to trial, to be subject to the approbation or disapprobation of the congregation, and the conclusive discretion of the presbytery. But that is agreeable neither to the spirit nor the words of this statute of Queen Anne. The spirit of that statute is to restore the ancient rights of patrons, which certainly would not be done by giving them only a share in the election of ministers, instead of the entire right of choosing them, which they had anciently. Then so far as relates to the presentation of ministers, this statute repeals the act 1690 wholly, which is not consistent with keeping part of it in force. Further, it orders the presentation to be to the presbytery, who are bound to receive and admit; whereas, the nomination or proposal by the heritors and elders in 1690, was to the congregation, who had a right of objecting, for

reasons assigned, after which the presbytery were bound to nothing, but were to dispose of the case at their discretion. I think it impossible, therefore, to hold that the act of Queen Anne, intended to place the presentees of the ancient and restored patrons to the presbytery, merely in the situation of those proposed to the congregation by the heritors and elders. The words of the act, I think, imply that the "ministers presented before "the making of this act," who were here in view, were ministers presented by *lay patrons* to presbyteries before the passing of this act, which carries matters back to the act 1592. It is therefore hardly necessary to observe, that even if this statute of Queen Anne had referred to the time immediately before its own date, it must have looked to presentations to *presbyteries* under the act 1690, upon which it was the duty of presbyteries to admit, such as *ought* to have been admitted, *i. e.* presentations completed by the approval of the congregation. In short, some interpretation must be received, not inconsistent with an effective *obligation* on the presbytery, the main object of the statute. But further, even if the act of Queen Anne had only given to the presentees of the restored patrons a right equal to that of the persons proposed by the heritors and elders, this could never have left them exposed to an absolute *veto* on the part of the heads of families, though it might have exposed them to the objections of the congregation, and the judgment of the presbytery. Indeed I cannot understand how the defenders can possibly plead this construction of the act of Queen Anne; for under that construction, the mode of admission of ministers was all to stand as regulated by act 1690, except that the minister was to be named or proposed by a lay patron, instead of the heritors or elders. What then was this mode as laid down in the act 1690? The minister is to be proposed to the congregation—they may disapprove, for reasons to be assigned—the presbytery to judge of those reasons, and conclude the business. Is that the mode followed by the defenders, or ordered by the Act of Assembly? On the contrary, under that act, the presentation is to the presbytery, not the congregation; the presbytery do not even refer it to the congregation, but to the male heads of families; and they are called on to disapprove, not on reasons, but without any reasons; nor are the presbytery to pass judgment on their disapproval, but to hold that disapproval as of itself conclusive. Nothing can be more contrary to the method of the act 1690. If then it be true, that ministers ought still to be admitted as under the act 1690, the defenders have no case whatever. But the idea is inadmissible altogether. I have said what I conceive to be the true meaning of the statute of Queen Anne. This statute stands unchanged, and in force at the present day.

From this deduction of the statutes then, it seems to me, that the duty of the presbyteries is to sustain presentations by a true lay patron simply ; and if the presentee be qualified, to admit him to the church—*i. e.* immediately to put him on trial, and admit him, if found qualified, or reject him as unqualified, if he shall on trial be found so. It must follow, that the presbytery could not, without violation of the statutory law of Scotland, sustain a presentation only to the effect of inquiring, whether it had the concurrence or dissent of a majority of the male heads of families ; and on finding it was dissented from by such majority, reject it without any trial of qualification at all.

It appears to me abundantly plain on this point, that the Act of the General Assembly could not make the proceedings of the presbytery at all less illegal. The Assembly of the Church of Scotland, I hold to have no power to repeal or suspend acts of parliament. Whatever a divine may think, in a religious view, yet to a lawyer there can be no room for doubt, on that subject. And I agree with the senior counsel, that the subjection of the Assembly is not owing to any contract between Church and State, but simply to the supreme power of the legislature, which every subject of this country, and all bodies consisting of subjects of this country, must obey. The existence of the act of Assembly, though it may free the presbytery from moral blame, can never be pleaded as making their proceedings less illegal, if they be, as I think they are, in violation of express acts of parliament. In truth, though the Procurator for the Church spoke much of the legislative powers of the Assembly, he did not, I think, quite argue, that those powers were independent of parliament, but rather rested them on grants to the Church by act of parliament. Parliament, however, neither did nor could grant to any other body of men powers of rival legislation. Parliament has no power, by the constitution of this country, to abdicate its own supremacy, and give itself a superior or an equal in legislation. I repeat, therefore, that when the question is, whether any thing is illegal as being contrary to act of Parliament, it is utterly vain to cite any act of Assembly as supporting it in any degree.

But it is said, that it is a fundamental principle of the Scotch Church, that no minister is to be intruded on a parish against the will of the people ; and that this principle has been recognised by parliament, and established by the usage of the church, which, ever since the Reformation, has required a *call* by the people of the parish as legally necessary to the admission of a minister, whether presented by a patron or not, to the refusal of which call this dissent is equivalent. I can see no sufficient authority for these propositions. No statute, decision of a court of law, or *dictum* of any writer on law, seems ever so much

as to hint at any such fundamental principle. It is mentioned, indeed, in the First Book of Discipline as a fit rule for the guidance of the superintendent and his council, when using their *jus devolutum*, under a contemplated system of popular election. But even there it is declared, that if the people are unreasonable, the church ought to proceed to overrule them. The words are (speaking of the minister elected by the superintendent): "If his doctrine be found wholesome, and able to instruct the simple, and if the church justly can reprehend nothing in his life, doctrine, or utterance, then we judge the church, which before was destitute, unreasonable if they refuse him whom the church did offer; and that they should be compelled, by the censure of the council and church, to receive the person appointed and approved by the judgment of the godly and learned." And it says again: "But violent intrusion we call not, when the council of the church, in the fear of God, and for the salvation of the people, offereth unto them a sufficient man to instruct them, whom they shall not be forced to admit before just examination, as before is said." In another place it says: "No minister suld be intruded upon any particular kirk without their consent; but gif any kirk be negligent to elect, then the superintendent with his counsell suld provyde ane qualifeit man within fortie days." This is very far from sanctioning any principle of popular call or *veto*, excluding ministers duly chosen by those having the right of nomination. But, after all, this book was never sanctioned by the legislature; but on the contrary, patronage was established by the act 1567, which certainly says nothing of any popular call or *veto*.

The Second Book of Discipline, in like manner, disallows patronage, giving the election or calling of ministers to the presbytery or eldership, over the people. "This ordinar and outward calling," it says, "has twa parts, election and ordination. Election is the chusing out of a person or persons maist able to the office that vaikes, be the judgment of the eldership, and consent of the congregation, to whom the person or persons beis appointed." And then afterwards it says: "In this ordinar election, it is to be eschewit, that na person be intrusit in ony of the offices of the kirk, contrar to the will of the congregation to whom they ar appointed, or without the voice of the eldership." And again, among the heads of reformation which the kirk craves, it is set down: "The libertie of the election of persons callit to the ecclesiasticall functions, and observit without interruptions swa lang as the kirk was not corruptit be antichrist, we desyre to be restorit and retein it within this realm. Swa that nane be intrusit upon ony congregation, either be the prince, or ony inferiour person, without lawfull election, and the assent of the people owir quham the person is

“placit, as the practice of the apostolical and primitive kirk, and “gude order craves.” And there is also the passage quoted by Lord Gillies, expressly claiming freedom from patronage as incompatible with this right of non-intrusion into parishes. But this was never sanctioned by parliament, which, on the contrary, passed the statute 1592, again establishing patronage, giving to the presbytery the full power of collation on presentation of patrons, and expressly imposing on it the duty of receiving any qualified presentee, but saying not one word of popular call or *veto*.

As to the practice of the church in regard to calls, I do not pretend to be able to trace its history precisely. But this I think is quite plain, that it must have originated in the retention under patronage of a form applicable to popular election of ministers. For what is a *call*, but the choice of a minister? or a popular call, but an *election* of the minister by the people? It was therefore of necessity in contradiction to patronage, and when continued under patronage, must necessarily have been originally a mere piece of resistance to the legislature on the part of the church. It was a claim, not of a *veto*, but the substance or the shadow of an election by the people, kept up by the church against acts of Parliament. Accordingly I have heard of no instance of such a call prior to the time when the election of ministers was given to the people by statute. It is plain, therefore, that unless this resistance can be said to have abrogated the statutes by desuetude, it can be of no avail. But that can never be said. For the statutes were generally effectual, and the resistance of the church degenerated into a mere form, that could scarcely be called illegal, because it was in substance nothing, and was found to be so by the General Assembly itself, by innumerable decisions, standing together for a long course of years. They would not indeed quite abandon this palpable contradiction in terms, of a call by the people after a valid presentation by the patron. But they brought it to be what the Procurator for the church indignantly described as a mockery. He said this was done by a party. But that party formed the majority of the General Assembly. I do not think, however, there was any *mocking* in it. They retained it as soothing to the people—as a decent sacrifice to the memory of better times, and an *encouragement* to popular ministers. But surely that kind of resistance could not abrogate statutes. On the contrary, it was a substantial obedience of them, though by reluctant parties.

There is nothing then, I think, in any principle or practice of our church, far less in any recognised by parliament, that can at all support the plea of the defenders on this point. I need not here fore enlarge on the distinction between a call, in any view

of it, or the want of one, and the assent or dissent required by the act of Assembly 1834, acted on by the presbytery in this case. I may only say I think the Dean of Faculty shewed that with great force of argument.

It has however further been said, that the General Assembly have power to constitute the *qualification* of ministers, and may state agreeableness, or rather non-disagreeableness, to a majority of male heads of families as a part of such qualification. That seems to me utterly inadmissible. (1.) The unwillingness of a majority of male heads of families to concur in the choice of a person to be minister is quite distinct from his qualification. It only shews that *they* would not choose him, *i. e.* generally that they would choose somebody else; and it may occur though the presentee be the most gifted and distinguished clergyman of the whole church. (2.) The adoption of such a qualification is directly barred by the law of patronage which binds the Assembly. By that law, the patron is to name the minister out of the number of qualified men. Would it not be a jest to say, that the Assembly, under that law, will make his nomination by somebody else than the patron, or the concurrence of somebody else in his nomination, a part of his qualification? That I should scarcely call a fraud on the law; for I rather think it would be open and manifest resistance of it. What would have been thought of the matter, if immediately after the act of Queen Anne had bound the presbyteries to admit qualified presentees, the church had passed an act of Assembly, declaring that patronage was unscriptural, and therefore that any person accepting a presentation was *ipso facto* disqualified? I cannot see that it is at all more lawful for them to pass an act declaring that presentation by a lay patron, without the concurrence of a body of people constituted by the church, is contrary to the law of the church, and therefore that any person offering a presentation without the non-dissent of a majority of male heads of families is *ipso facto* disqualified. But that is just the substance of the act of Assembly in this case. I need hardly add, that if the dissent of male heads of families were a *disqualification*, it must have been so equally against the presbytery acting *jure devoluto*. But that is not pretended. The plain truth is, the church were not fixing qualification, but dividing patronage; and though willing to share with the people the right of the patron, they used no such liberty with their own right of nomination.

II. But there remains the questions of jurisdiction and competency. Now as to these, it is not denied that patronage and presentation are patrimonial rights; and I therefore think the declaration of them must belong to this court, on the action of the patron and presentee against any party advancing pretensions incon-

sistent with their existence in the patron and presentee. I view the matter in the same light as if the presbytery had rejected the presentation without trial, because they claimed the right of electing the minister themselves. In truth the presbytery do claim the patronage for themselves. For Lord Kinnoull cannot recall his presentation, nor grant another, while Mr. Young holds it. The effect therefore of the presbytery rejecting Mr. Young's presentation must be, that in terms of the act of Assembly, the presbytery must claim the *jus devolutum* to name the minister of Auchterarder themselves; and it is expressly as a part of the procedure prescribed by this act, that they have rejected the presentation of Mr. Young. They say, indeed, that they are not now attempting to exercise the *jus devolutum*. But they offer no renunciation of it, and must necessarily intend to exercise it, if they shall prevail in this cause. Even if they should execute renunciation, the fact would remain, that they claimed a share of the election of the minister for a body of men set up wholly by their own pleasure, and who neither do nor can pretend any power to be in themselves, excepting by that pleasure. This is just an attempt to exercise a share of the presentation by the presbytery, as much as if they claimed it directly for themselves, or their moderator, or any one parishioner, or any set of parishioners they chose to name, as they named the male heads of families in the parish. That they act under the order of the Assembly is nothing, as I have already said, the Assembly having no right in law to give any such order in the face of the acts of parliament, or the presbytery to obey it, more than if it had been advice sent to them by a synod of presbyterian brethren at London or Geneva. We must look here to the presbytery, and are not at liberty to look beyond it. We cannot and need not make a party of the General Assembly. The presbytery then do claim the presentation, when they claim a share of it for persons whose interference rests solely on their own pleasure. The male heads of families do not pretend to come forward of themselves. They give their assent or dissent, because it is asked by the presbytery. But they are not claimants of the patronage, nor claimants in law against the patronage, further or otherwise than as the church, *i. e.* the presbytery, claim it for them. If patronage then, be a civil and patrimonial right, which is on all hands admitted, must not this right be capable of being vindicated in the civil court against the only parties who, directly for themselves, or indirectly through others set up by them, claim the whole or a share of that right?

But even if we could regard the conduct of the presbytery as a mere absolute rejection of the presentation, as if they had found that patronage was contrary to scripture, and therefore rejected the presentation, renouncing all *jus devolutum*, and all claim of

right to fill up in any way the vacant office and benefice, (though that is really an impossible case,) I should still view the question in the same light, as not one of examination or ordination, but truly of patronage and presentation. Is it not a question of patronage, whether a presentation be truly valid, and binding on the presbytery, or be not? The definition of patronage in Scotland is, the right of naming a qualified person to be admitted to the ministry of a parish by the presbytery. If it be not that, it is nothing. The question, therefore, of the obligation of the presbytery to admit or reject him at their own pleasure, is a perfect instance of a question on the alleged civil right of patronage, and if there be a civil court having right to try questions of patronage, it must have power to try that question. To allege the contrary, seems to me a contradiction in terms.

And it seems to me manifest, that even in this view, and *a fortiori* in the true and real view of this case, it must be with the presbytery as a party that the question must be tried. If there be a civil right, and a civil court having jurisdiction to try it, must they not have right to try it as against the party against whom, by its own nature, as well as by the express words of the statute, the right is binding, and who yet deny the right, and refuse to fulfill the obligation corresponding to it, even if it could not be said, as I think it clearly can be said, that these parties by denying and resisting the right, are in truth usurping it themselves? How else can it be a civil and patrimonial right? It is true, that the jurisdiction in the examination, ordination, and collation of ministers belongs to the church. But there is no question here under any of these heads. The question is strictly a question of patronage and presentation. The pursuers say that they have these. The presbytery deny and resist this in effect, unless the presentation be accompanied by an act, positive or negative, of the people, which it is well known cannot be obtained. That is just saying, in substance and effect, that the legal right of patronage is not in Lord Kinnoull, but in him jointly with a body set forward by the presbytery, and that failing such concurrence, it is in the presbytery itself; and that therefore they, the presbytery, of their own motion, without the intervention of any competitor, reject the presentation of Lord Kinnoull alone, and will, in due time, exercise their own *jus devolutum* themselves. It is manifestly a question of patronage, and nothing else. In such a question, then, there can be no court but this court, and no party but the presbytery.

Many things have been said in answer to this obvious view of the case; but none of them appears to me satisfactory.

It is said, that the statute 1567, providing for presentations to superintendents, or others having commission of the kirk, excludes this action, since it provides, "that in caice the patron present

“ane person *qualified to his understanding*, and failzeing of ane,
 “ane uther within the said six moneths, and the said superintend-
 “ant or commissioner of the kirk refusis to admit the person pre-
 “sented be the patron, as said is, it sall be lesum to the patron
 “to appeale to the superintendant, and minister of that province
 “quhair the benefice lyis, and desire the person presented to be
 “admitted, quhilk gif they refuse, to appeal to the General As-
 “sembly of the haill realme, be quhome the cause beand decyded,
 “sall take end, as they decerne and declair.”

Now, (1.) this statute begins by enacting, “that the exami-
 “nation and admission of ministers within this realme, be only in
 “the power of the kirk;” but it immediately adds,—“the pre-
 “sentation of laick patronages alwaies reserved to the just and
 “auncient patrones,”—manifestly shewing, that the civil right of
 patronage was not meant to be abolished or diminished, or at all
 given to the kirk, but was to stand good against the kirk, and to
 form the ground of the examination and admission of ministers,
 which was given to the kirk; and then follows the provision I have
 read. Taking these clauses together, it seems to me sufficiently
 clear, that the exclusive jurisdiction of the kirk was only in the
 examination and ordination, or *admission*, as it was then called.
 For in the First Book of Discipline there was no imposition of
 hands; nor is the word ordination used. There can be no doubt,
 then, what the examination and admission mean which were ap-
 propriated to the superintendents by the statute 1567; and, I
 think, there can be just as little doubt, that it was in this matter,
 their proper and legal function, that the judgment was to be sub-
 ject to appeal to their superiors, the provincial superintendent and
 General Assembly. The very clause founded on by the defenders
 speaks of the case as one where the patron presents a person qua-
 lified *to his understanding*, and yet not admitted, evidently con-
 templating the rejection of the presentee, as not found *truly* qualified,
 on the examination taking place, after the presentation was legally
 made, and legally received. Well knowing, as the Scottish Par-
 liament did, that the kirk was hostile to lay patronage, it is im-
 possible to believe that they meant to put it into the power of the
 superintendents and General Assembly, by their uncontrolled
 power, to abolish it at pleasure, by refusing to receive presenta-
 tions at all, or adjecting conditions to them which had the effect
 of defeating the right of patronage.

(2.) If this could be held to have been the interpretation of the
 statute 1567, I should have great doubts, whether the provision
 was revived, and extended to presbyteries, by the act 1592, and
 act of Queen Anne. For in neither of these is there any mention
 of any such provision; while, on the other hand, in both these
 statutes, the presbytery is expressly bound to receive the presentee

of a lawful patron. It is to me incredible, that while using this peremptory language, parliament meant to leave it in the power of presbyteries, provided only they were supported by the General Assembly, to abolish patronage, and vest the nomination of ministers in themselves, or persons appointed by themselves.

It has been further pleaded, that the statute 1592, c. 117, giving right to the patron to retain the fruits of the benefice, when the presbytery shall refuse to admit a qualified minister presented by the patron, was exclusive of all further remedy. But it is nowhere said in this statute, that this remedy is to exclude all other, and the statute 1592, c. 116, implies the very reverse, when it binds the presbytery to receive presentations from lay patrons, without any alternative or qualification. It does not say in one provision, that the presbytery shall admit, *or* the patron retain. But in one separate statute, absolutely binds the presbytery to admit, and in another separate statute, authorises the patron to retain. It is indeed plain enough, that this remedy of the statute 1592 c. 117 was expedient, whatever other remedies might be open, in order to authorise the patron to levy the stipend, while the admission of the minister was, in whatever way, delayed by the presbytery, which, it was too plain, might in fact be done in spite of all legal remedies for compelling them to do their duty.

Accordingly, it is utterly impossible to reconcile any of these views; 1st, of the absolute right or absolute power of the kirk to reject presentations; or, 2d, of the strict limitation of all redress against any wrong done by the kirk in this respect, in retention of the stipend *in pios usus* by the patron; or, 3d, to the incompetency of making the presbytery parties;—it is, I say, impossible to reconcile any of these to our practice. For I can see no case where the question truly was one of patronage and presentation, not of examination and qualification, in which the jurisdiction of this Court was not sustained, without any limit. I see a variety of cases in which the presbytery were parties, defenders or pursuers, in which this court pronounced judgments not limited to the question of retention of the stipend, and in which these judgments proceeded in circumstances which must have barred all discussion in this court, if the kirk had possessed the exclusive power or jurisdiction contended for.

In the first place, there is the old case of Haddington, (31st July 1680, *Mor.* 9903), reported by Fountainhall in these words:—"In the declarator pursued by the town of Haddington, and heritors of the landward parish, against the Earl of Haddington, anent the presentation of the second minister of Haddington, the Earl having presented one as second minister, the Lords, upon a bill given in by the town, (in regard they could not get the cause advised this session), stopped the planting of the church,

“ and any further procedure thereon, till the 1st of November
 “ next, as being vitious, done *pendente lite*, during which *nihil*
 “ *est innovandum*.”

Then there is the case of Auchtermuchtie, (15th Feb. 1735, *Mor.* 9909), in which this court, after the presentation was before the presbytery, granted an interim interdict against the presbytery proceeding, and censured them for breach of it. How could that have been, if it had been understood that this court had no jurisdiction at all in the matter, after a presentation had been made to the presbytery, and that the presbytery had a right to proceed as a court of exclusive jurisdiction in respect to it, as the court of Exchequer is in revenue cases, or the Justiciary in criminal cases?

There is the case of Dunse, (25th Feb. 1749, *Mor.* 9911), in which the presbytery had declined to sustain the presentation of the patron, and appointed a moderation of a call to fill up the vacancy, and in which, in a declarator by the patron against the presbytery, this Court “ repelled the objections made to the pursuer’s right, and to the person by him presented, on account of his not having taken the oaths before his first licence, in respect of the answers; and found, that the pursuer had in *possession* sufficient right to present, and that the right has not fallen to the presbytery *tanquam jure devoluto*, and decerns “ and declares.”

There is the case of Snodgrass against Logan, (16th June 1772, *Fac. Coll.*) in which, there being a double presentation, in consequence of a contested election of a minister, and a declarator being brought of the invalidity of the presentations respectively: “ It occurred to some of the judges that there was a preliminary question, viz., touching the competency of this Court to try the merits, in respect that here there was but one patron, and the question is only with regard to the mode of presenting; but it carried that the Court had jurisdiction; for that it resolved into a point of civil right, which of the two presentees was legally elected; and, after a long litigation, the final interlocutor of the Court was as follows: Repell the reasons,” &c. In the present case, the opposite party is the presbytery, who have not yet named a minister, though they of course intend to do so. But in other respects this is just as much a question of civil right, and of patronage and presentation, as that of Snodgrass.

To the same effect was the decision in the case of Tait against Skene Keith, (22d Jan. 1778, *Mor.* 9938), in which, after proceedings in the church court, this Court, and the House of Lords, declared the preference of one presentation over another.

In the case of the Presbytery of Falkirk against the Earl of Callender, (8th Dec. 1696, *Mor.* 9961), a declarator was sus-

tained at the instance of the presbytery against the lay patron, that he had lost the right of presentation during an existing vacancy. It never occurred to the presbytery, that they could reject the patron's presentation at their own hand without control.

In the case of the Procurator of the Church of Scotland and the Moderator of the presbytery of Ayr against the Earl of Dundonald, (2d March 1762, *Mor.* 9961), "A patron having given a presentation, the person presented signified his acceptance by letter; but when he came to be settled, he declared his renunciation of the presentation, as he had since his acceptance got another. The patron, in the course of post, gave a new presentation, but which happened to be within the six months from the vacancy being declared. The presbytery claimed the *jus devolutum*. The Lords found, that by the first accepted presentation the prescription was interrupted, and that the right of presentation had not fallen *jure devoluto* to the presbytery."

So in the case of the presbytery of Paisley against Erskine, (10th Aug. 1770, *Mor.* 9966), "A minister of a parish having died on 2d January, and the patron being abroad, a presentation was not offered to the moderator of the presbytery till the 2d July thereafter, which being a Sunday, it was refused. It was received, however, the day following; but this being one day after the lapse of the six months, the presbytery brought an action to have it declared that the right of presentation had fallen to them *jure devoluto*. The Court was of opinion that there was not ground for the action."

The case of the Presbytery of Strathbogie against Sir William Forbes, (2d Aug. 1776, *Mor.* 9972), was of a similar import, a declarator by the presbytery of the validity of their own nomination of a minister, on rejection of a presentation by the lay patron, and their own *jus devolutum*.

The case of Lord Dundas and Mr. Nicholson against the Presbytery of Zetland and Mr. Gray, (15th May 1795, *Mor.* 9972), however, is particularly strong. For in that case the presbytery had actually rejected the presentation of Lord Dundas, and had settled another minister; and the declaratory conclusions of the action by Lord Dundas and his presentee were similar, and even went further than those in the present case. Yet decree of declarator was pronounced by this court, without any limitation as to the effect of that decree.

Lastly, there are the two cases of Kiltarlity, of very modern date, in the first of which, after a presentation was received and sustained by the presbytery, though under a condition, the Court held a suspension and interdict of their proceedings to be competent, on the ground that the presentation was not valid, and

granted interim interdict against the presbytery, though ultimately they found, in the suspension, that the title of the suspenders was not sufficient. And in the second case, the Court found in a question where the presbytery were themselves parties pursuers of a declarator, that the presbytery were barred from rejecting the presentation, or declaring its invalidity.

It seems to me impossible to read these cases, without being satisfied, that in cases, not of examination or ordination, but where the validity of patronage and presentation are in question, it has never been held that there is any absolute right or exclusive jurisdiction in the church; nor that the proceedings in this Court must be limited precisely to the question of retention of vacant stipends by the patron. And it seems, if possible, still clearer, that no difficulty has ever been held as to admitting the presbytery, either as pursuers or defenders, in such cases where it was the party by whom the patron's right, or that of his presentee, was defeated or resisted. It has been said that many of these were competitions for the patronage or presentation. But there could be no such competitions in this Court, if the presbytery could reject presentations or admit them by their own uncontrolled authority. I think, therefore, that the present action, as libelled, and in so far as the conclusions are at present insisted on before us, *i.e.* the first declaratory conclusions, is competent in this Court, and against the presbytery, as well as in itself well founded.

A difficulty has been raised respecting the effectiveness of any decree of declarator pronounced by this Court. It has been asked, what is to be done if the presbytery disregard it, and adhere to the act of Assembly in spite of it? I do not think we are bound or entitled to refuse declarator till that question has been precisely answered. It is a question which might equally have been asked in every case where the Court pronounced a judgment on the matter of patronage or presentation against a presbytery. It might always have been said, the Court may declare the right of the patron, and of course, (for the one is the counterpart of the other,) may declare the duty of the presbytery; but what if the presbytery resist the judgment,—can you declare them rebels, and fill the jail with ministers and elders? or will you grant an adjudication in implement, to serve for ordination? The statutes have not expressly declared this; and I am not prepared to say, that we should sanction it at present, or how precisely the duty of the presbytery, under our decree, is to be enforced. But that creates no difficulty in pronouncing decree of declarator in this case, more than in other cases of patronage, where the presbytery were parties,—no difficulty either in the form of declaring the *right* of the patron, or, what is in substance identical, though differing in form, in declaring the *duty* of the presbytery, corresponding to that right.

The one form of judgment, I think, is just as competent as the other. The matter of both forms is identical. If the difficulty of execution bars one, it must equally bar the other, and then there is an end of jurisdiction in this Court in reference to patronage altogether.

But I cannot conclude without saying, that if nothing could follow on our judgment but the disposal of the stipend, as vacant, I think it quite clear that would support the right of the presbytery to obtain the judgment. It is not certain that the pursuers would not have a direct patrimonial and pecuniary interest in the stipend under it. They desire at least to be heard on that question, and have not been yet heard. But assuming that the stipend must go the Ministers' Widows' Fund, in that view, I think that the patron, having given to him, by express statute, in support of his right of patronage, the provision that the stipend shall be held as vacant, and go to pious uses, that provision he has right to insist upon, whatever be the *pious use*. What that shall be may be matter for the Court to consider. But if he pleads that this disposal of the stipend to any pious use, may avail him to obtain execution of the law, I am quite clear he is entitled to have the benefit of it, and so to a declarator forming the ground of it. And after all, why is even this alone to be held an insufficient sanction? It is a suspension of the legal establishment, for a minister of that parish, till the presbytery shall obey the law. Is this to have no effect, as a compulsitor on the church? Will the church say so? It would be a dangerous plea. It would be a declaration, that the church, in part at least, discarded establishment, and could do better without it. But the church will not say so, I am confident; neither will it attempt to contend with the legislature in this case, more than it has done in other cases, where the judgments of this Court have been fully effectual.

Thursday, March 1.

THE LORD PRESIDENT —“ LORD MEDWYN.”

LORD MEDWYN.—MY LORD—I approach to the decision of this case with the deepest feelings of responsibility, on account of its vast importance, and the great and conflicting interests involved in it. I have to regret the want of that advantage which some of your Lordships enjoy, who have had the opportunity, as members of the Church, and with the knowledge thence acquired, of hearing this question discussed in all the eagerness of earnest debate, and of studying it in all its bearings. My acquaintance with the subject was only that superficial knowledge which one acquires of any matter of controversy which has occurred in the domestic history of the world, when not called upon by duty, or invited by inclination, to examine minutely into it. I have, however, endeavoured to supply this defect since this question came judicially before us, keeping it always strongly impressed upon my mind, that the opinion I had to form, was not to rest as a matter of mere speculative curiosity, but must influence my view of the delicate and important question now before us ; and if the opinion I am now to give were to be estimated according to the pains I have bestowed in making myself acquainted with the subject, and the anxious desire I have felt to arrive at a sound and impartial decision, I would not preface it, as I now do, by claiming your indulgence for the great encroachment I must make upon the time of the Court. But, in truth, the question is so vital to the peace of the country, and the field of discussion entered on is so ample, that I have been unable to bring what it seems necessary to say upon it within any reasonable compass.

Although I stand in the peculiar situation of being a dissenter from the Established Church, I trust I need not profess my great regard for it, founded on the firm conviction of the truth of the statement, “ that the practical effect of the Church Establishment “ in Scotland, on the general information of the people, on their “ private morals, and on their religious character, equals, if it does “ not surpass, whatever can be imputed, in the same points, to any “ other Church in the world.” On this my respect for the Presbyterian Church in this country rests, and on this my earnest desire for its continuance and prosperity is founded.

The question we are called upon to decide is, whether it was

within the power of the General Assembly to pass "the act anent calls," in 1834? and whether it be competent for the civil court to inquire into this matter, and to grant relief as called for by this summons? The two points can scarcely be separated in the discussion.

Notwithstanding the wide field of inquiry which has been gone over by the parties in this case, I am inclined to think that it is not necessary, for the legal discussion of the points involved in it, to go back in the History of the Church in this country, much beyond the last change in its form of government, when, upon the Revolution, and in terms of the Claim of Right, Prelacy was put down, and the Presbyterian form finally established. By 1690, c. 5, the Presbyterian Church government and discipline were ratified and confirmed, and the act 1592 was revived and renewed "in the whole heads thereof, except that part of it relating to patronage, which is to be hereafter taken into consideration."

Accordingly, in the same session of Parliament, this matter is regulated, and by 1690, c. 23, the power of presenting ministers to vacant churches is taken from patrons, and "to the effect the calling and entering ministers may be orderly and regularly performed, the heritors of the said parish (being Protestants) and the elders are to name and propose the person to the whole congregation to be either approved or disapproved by them." If they disapprove, the disapprovers are to give in their reasons to the effect the affair may be cognosed by the presbytery, at whose judgment and by whose determination the calling and entry of a minister is to be ordered.

Now it is clear that *calling* here means nothing else than what is equivalent to, and was now put in place of, the presentation by the patron. Application by the eldership and heritors of the parish for the *call* and choice of a minister, is to be made to the presbytery, within six months of the vacancy. In the case of royal burghs, it is said "the *call* shall be by magistrates, town-council, kirk-session, and heritors of the landward parish;" and in the clause about the 600 merks, it bears, "allowing in the mean time the heritors and kirk-session to *call* the minister conform to this act." And the act 1693, c. 6, requires the oath of allegiance and the assurance to be taken "by all the heritors voting in the *calling* of ministers." The heritors and elders are to name, that is, choose the minister, and propose him to the congregation; their approbation, however, is not a necessary step to his admission, for should they disapprove, unless their reasons are judged sufficient by the presbytery, the nomination by the heritors and elders is still to take effect. This is plainly the provision of the act.

I think it is of great importance, even if we adopt the views of the defenders, to attend to the form which was observed in calling and admitting a minister under this act. Perhaps I attach more importance to the practice of the Church throughout, for the de-

cision of this case, than it justly ought to have, from the ignorance under which, I must with shame acknowledge, I laboured as to the history and constitution of the Church of Scotland, after it became Presbyterian, till I was called upon to consider this question. But as I think I have obtained considerable light from my study of the proceedings of the Church, and have arrived at a conclusion far more satisfactory to my own mind than I otherwise could have done; this must be my apology for dwelling, I fear with what will be thought unnecessary minuteness and consequent tediousness, on what others may consider of little value, as having been long well known to them.

Pardovan's Collections were published in 1707: this book was approved of by the General Assembly, and it is the authoritative standard of the practice of the Church, and it gives this as the form of procedure of chusing a minister under this act:—

Application is first to be made by the heritors and elders to the presbytery, (B.1.T.1. § 3.) and they appoint one of their number to intimate a meeting of the electors on a certain day, in order to the election of a fit person to supply the vacancy. (§ 6.) On that day the minister appointed “to moderate at the *election*, having ended
“sermon and dismissed the congregation, except those concerned,
“is to open the meeting of *electors* with prayer; and thereafter
“they proceed to vote the person to be their minister as they
“are called upon by the session-clerk * * * which vote be-
“ing taken and marked, the moderator is to pronounce the mind of
“the meeting that a call be given to the person named, which the
“clerk is to have ready drawn up, to be read and signed by them
“in presence of the moderator.”

The form of a call to a minister given by Pardovan (§ 7.), by which the heritors and elders, and magistrates (if it be a burgh),
“invite, call, and intreat him to undertake the office of pastor
“among us,” is plainly equivalent to a presentation, adapted to the circumstance of the electors being a portion of the congregation to whom he is to minister. Thereafter the moderator is to attest that he did moderate at the meeting of electors (§ 8.), and that the majority, or all present, made choice of Mr A. B. to be their pastor; and this he presents to the presbytery at their next meeting, who grant their concurrence, if they see no ground to delay or refuse it. Now observe he says nothing about the people or about the person chosen being proposed to them and approved or disapproved. It is merely the call by the electors which the minister attests.

As yet, so far as it appears from Pardovan, the person elected is not proposed to the congregation to be approved or disapproved. The person invited and called is taken on trials by the presbytery, and when approved of and judged qualified to be a minister of the gospel, and fit to be pastor of the congregation,

the presbytery resolve to proceed, unless something occur which may justly impede the same, (§ 18.), “and therefore do hereby give notice to all persons, especially the members of the congregation, that if any of them have any thing to object why Mr A. B. should not be admitted pastor here, they may repair to the presbytery, which is to meet at the day of , with certification that if no person object any thing that day, the presbytery will proceed without further delay.”

These are the words of the edict which is read in the church, and affixed to the church-door of the parish; and this, probably, was all that was meant by the framers of the act 1690, c. 23, since this was the practice which followed upon it as described by Pardovan. The presbytery meet at the church on the day specified, and receive the execution of the edict. Then the presbytery is to order their officer (§ 19.), three several times, at the most patent door of the church, to give notice that if there be any there who has anything to object against the person called his being their minister, they may come and do it to the presbytery, with certification as in the edict.

If there be no material impediment found (§ 20.), the presbytery is to name a convenient day for their meeting to ordain the candidate at the church of the congregation to which he is to belong.

Such are the steps of procedure mentioned by Pardovan for the choosing and inducting of a minister under the act 1690.

As I think it is of the utmost importance throughout every stage of this inquiry to attend, not so much to the declarations as to the practice of the Church, I beg to refer, in further illustration of this matter, to the proceedings in the appointment of a minister to Falkirk in 1695, as appearing in the records of the Presbytery of Linlithgow, given by Sir John Connell, as the mode of filling up churches between 1690 and 1712. (App. No. 33. to Connell on Parishes.)

25th September 1695.—The presbytery appoint Mr John Brand to supply Falkirk on Sabbath come eight days; and upon a commission from the session thereof, to intimate a meeting of all concerned to meet and commune anent the subscribing a call to a minister.

5th November 1695.—“Upon a commission from the session of Falkirk to R. H., appointing him in their name to desire the presbytery to send one of their number to moderate in a meeting of heritors and elders of that parish, appointed to meet on 19th inst., in order to the settling of a minister amongst them,” one is appointed to supply the parish on Sunday and to preach on Tuesday 19th, and “after sermon oversee a call subscribed by all concerned to a minr for that parish.”

20th November 1695.—“The presbytery having considered a

“ commission from the session of Falkirk to R. R., one of their number, mentioning the cause why the parish was not ripe at their last meeting to subscribe their call,” a new appointment is made to preach and oversee a call subscribed on 3d December.

4th December 1695.—“ Mr J. S. having reported, that according to appointment he had supplied Falkirk and had overseen their call subscribed,—compeared R. K., bailie in Falkirk, with several of the heritors and elders of the said parish, by commission from the rest of the heritors and elders thereof, who presented a call from the said parish to Mr W. B. (indorsed by the said Mr J. S.), with the reasons thereof for transporting him from Mid-Calder; which, after public reading, was sustained as orderly proceeded.”

Mr W. B., and his parish of Mid-Calder, are appointed to be summoned to be here next presbytery day to receive the said reasons of transportation. No appointment is made as to the parish of Falkirk. The people are not invited to approve or disapprove of the call, which is given by the heritors and elders only.

The Presbytery at a subsequent meeting referred the business of the transportation to the Synod.

27th May 1696.—An act of the Synod transporting Mr W. B. to Falkirk is produced to the presbytery. Mr A. B. is appointed to preach at Falkirk and intimate Mr W. B.'s edict, in order to his being settled minister there.

Linlithgow Church, 17th June 1696.—Mr W. B.'s edict being returned duly execute, as the execution thereof under Mr C. B.'s hands bears; “ which being three times publicly called (the doors being casten open), and none compearing to make any objection against the said Mr W. B.'s admission to be minister of the said parish of Falkirk,” Wednesday, 1st July next, is appointed for his admission, and Mr J. S. to preach on 28th June at Falkirk, and intimate the admission before the congregation.

Falkirk Church, 1st July 1696.—“ Mr W. B. was solemnly, publicly, and actually admitted and received in and to the ministerial and pastoral office, in and of the said flock and parish of Falkirk, by giving him the right hand of fellowship, according to the order of the Church; and also many of the heritors, elders, and others of the congregation present accepted of him as their minister.”

This is the Presbyterial procedure as given from the records of presbytery; but to see the whole action, it is necessary to attend to the proceedings of the kirk-session in the sessional records. On 3d December 1695, the minute bears, “ The same day the session considering that this day the heritors and elders did meet, and that after Mr J. S., moderator to the meeting, had signified to them, that according to their desire he was sent to oversee their electing and choosing of a minister, and a call subscribed to whom

“ they would pitch upon, if they were ripe for the same ; and interrogated whom they would nominate and choose, nominated and elected Mr W. B., minister of the gospel at Mid-Calder, without a contrary vote, to be their minister, and did draw up and subscribe a call to the said Mr W. B. The session, therefore, nominate and appoint R. H., (and five other members of session,) to attend the Presbytery of Linlithgow on Wednesday, and present to them the foresaid call, with the reasons thereof.

“ The session continue their recommendation to intimate their desire to the congregation.”

Such is the statement of the proceedings of this important meeting in the kirk-session records. It is a meeting of the heritors and elders alone ; the congregation is not present. They choose a minister and subscribe a call to him, and appoint it to be presented to the presbytery next day.

The appointment to intimate to the congregation their desire to have Mr W. B. appointed minister at Falkirk is continued ; that is, the recommendation to intimate it to the congregation is delayed, as I understand.

The presbytery, as we have seen, receive the call on 4th December, sustain it, and proceed immediately to summon the parish of Mid-Calder. The recommendation by the session about intimating the election to the congregation is not so much as reported to them. The presbytery do not stop in their proceedings till this has been done. With these proceedings at present the congregation have no concern. Their assent or dissent will be called for afterwards.

“ *15th December 1695.*—The elders reported that they had attended the presbytery and presented the call and the reasons thereof, and that citation had been given to the ministers and parish of Mid-Calder.” It is then added,

“ The session’s desire was intimat.”

The choice of the heritors and elders is only now intimated to the congregation. Nothing is done upon it, as if it were necessary to ascertain whether he is approved or disapproved by them. The intimation is simply made, and if they disapprove they will take their own measures for stating their objections to the presbytery ; and at all events, will be called upon to do so by the edict, after the approbation of the presbytery has been given, and prior to his ordination and settlement.

Sir John Connell also gives the proceedings of the same presbytery, in the election of a minister to Ecclesmachan in 1694, and to Linlithgow in 1700 ; and in neither of them is any formal intimation of the election of the minister mentioned as having been made to the congregation as part of the procedure the presbytery were bound to inquire about or attend to, till the edict is served. It is worth noticing, that in forwarding the steps for the calling and ad-

mission in the latter case, Walter Stewart of Pardovan appears by commission from the heritors, along with the Provost by commission from the Town-Council of Linlithgow, and two elders by commission from the kirk-session. These are the parties who give in the call, although along with it there is "a paper called adherence of the heads of families of the said parish to the call." But it is the call which is sustained, the call or invitation by the heritors and elders, what is equivalent to the presentation by the patron, in which the people do not interfere, although, in one, but in one only, of these three instances, an adherence is given in by them at this stage of the proceedings. It is not at this period that they are called on to state objections; it is after the trials only when the edict is formally served, and all invited to object. I do not profess to be so intimately acquainted with the details of practice throughout the Church as to be able to affirm that, in not one of the many presbyteries in the Church, a different form of procedure was adopted; at the same time, I know of no contrary practice; and I give the above as the authoritative rule prescribed by the great formulist of the Church, and verified by what is given by Sir John Connell as a specimen of the practice observed in elections of ministers under the act 1690. I shall afterwards have occasion to shew, that under the Directorie 1649, which the framers of this act probably had in their eye at the time, the approbation or disapprobation of the people was often given exactly at the same period in the constitution of the pastoral relation, that is, after the trials by the presbytery, and previous to ordination.

But it is most important to observe, that the only presbyterial act, in calling upon the people to interfere, is by the edict, and it is at the period in the preparatory steps just prior to ordination, that that writ is served; and the presbytery does not appoint one of their number to see the choice of the minister intimated to the congregation, nor require him to moderate in that act, nor to collect the assents or dissents, nor report them to the presbytery. With all this the presbytery has no concern. It is the kirk-session who intimate the choice. But at whatever time dissent or disapprobation was given, it is quite clear, and that is the material point, that objections must be special, and proved to the satisfaction of the presbytery. A power to dissent, without assigning any reason, was neither now, nor at any previous period in the history of the Church, ever dreamt of.

This is distinctly stated by Sir H. Moncreiff, a most competent authority, to be the meaning of the act: "The congregation had no power of rejection without substantiating reasons, which the presbytery, and (on appeal), the superior courts, were to pronounce sufficient." (Appendix to Life of Dr Erskine, p. 35.)

Such continued to be the law and practice of the Church till the act 10th of Queen Anne was passed, 22d May 1712; for there is

no act of Assembly (if that were enough) introducing any change ; and the overture 1711, referred to in pursuer's Case, p. 52, proceeds upon its still being the duty of objectors to give in special objections. I may notice in passing, that when the act of Assembly, 22d May 1711, speaks of calls in the questions to be put to ministers before ordination,—“ Have you used any undue methods, either by yourself or others, in procuring this call,” (Peterkin, v. 2, p. 176) ; which was noticed as a proof of the popular call co-existing with a patron's presentation at that time, this is a mistake ; the call here alluded to is the call by the heritors and elders, under the act 1690, because this act of Assembly is just one year prior in date to the act of Queen Anne, which restored patrons to their ancient right, abolishing the call which had existed since 1690. In short, the call by the heritors and elders existed at the date of this act of Assembly, but not a presentation, and it is the call there alluded to.

By the act of Queen Anne, “ the right of patrons to presentation “ of ministers to churches is restored, settled and confirmed to them,” and the duty of the presbytery is no longer prescribed to them to oversee the calling and entering ministers ; but after 1st May 1712, it was declared lawful for her Majesty, and every other person who has right to any patronage of any church, to present a qualified minister ; “ and the presbytery of the respective bounds shall and “ *is hereby obliged to receive and admit* in the same manner, such “ qualified person, minister, as shall be *presented* by the respective “ patrons, as the persons or ministers *presented before the making “ of this act* ought to have been admitted.”

When the act says that the minister presented by the patron shall be received and admitted as the persons *presented* before the making of this act were admitted, what is its meaning ? Is it that as patronage was now restored, the practice as to the admission of a minister during the subsistence of patronage, when only a presentation was given, or the candidate would be *presented* to the benefice, should be followed ; or are we merely to look to the practice immediately before the making of this act ? Now it must be observed, that, as already noticed, the act 1690 never speaks of a *presentation* by the heritors or elders ; it is termed the call and choice of a minister by them ; and in this act also, the call under the act 1690, and the *presentation* of a minister by a patron, are uniformly contrasted. Observe how steadily this is done : the preamble, after stating that of old the *presenting* of ministers did belong to patrons until the act anent patronages, when the *presentation* was taken from patrons, and for a sum of money to be paid by the heritors and liferenters, patrons were to renounce their right of *presentation*, goes on thus :—And whereas that way of *calling* ministers, introduced by the above act, has produced heats and divisions among those by the said act authorized to *call* ministers, therefore the said act is repealed in so far as relates to the

presentation of ministers, and the right of patrons to the presentation of ministers to churches is restored ; so that when the act 1712 refers to the manner in which persons *presented* before the making of this act were admitted, we must go back, I think, to that period before the act when presentations took place, that is the period prior to 1690. The object was to restore patrons to their ancient rights, which had been taken away by the act 1690 ; and it was most natural to refer to the practice while patronage existed, as the model for what should now take place again when it was restored. Accordingly, this is the view taken of it by a lawyer of great eminence in his day, who had much practice in the Church courts, and who was well versed in Church law. For I find that in a pamphlet, entitled *Thoughts of a Layman concerning Patronage and Presentations*, written by Crosbie, 1769, after quoting the passage in the act 1712, to which I have alluded, he adds, "Hence the settlements of churches and the powers of patrons were brought back to the same footing on which they had stood before the act 1690, that is to say, the old statutes were made the rule." This clearly must have been the view of this statute then held by the anti-patronage party. It also is the opinion of Bankton, to which I shall afterwards allude. To give it a different meaning is quite a modern notion. The period before 1712, when ministers were presented by patrons, was from the Reformation down to 1649, and from 1660 to 1690. Now there cannot be a doubt that during both those periods in the history of the Church, during which patronage subsisted, the people never interfered in the admission of a minister till they were invited to do so by the edict, and the effect of the invitation thus given was only to object to the presentee's life and doctrine, after his trials by the presbytery have been sustained. Such a thing as a call by the people, or moderating in a call, is never heard of.

I cannot say that I have been able to discover how far this is either admitted or disputed on the part of the defenders. I listened during the pleadings with deep attention, in the hope of having the history of the popular call elucidated ; but I thought there was a great vagueness in the statements of the learned counsel, as there was little more than the assertion that it was immemorial in the Church, and the initiatory step in constituting the spiritual relation between the pastor and his flock. But I trust I shall be able to prove the statement I have made, that it was unknown while patronage existed either in Presbyterian or Episcopal times ; at present I assume this ; and therefore if the direction of the act be, that on a presentation a minister is to be received and admitted as during the times of patronage formerly, the interference of the people is not sanctioned till the edict invite them.

But suppose this most reasonable interpretation of the act not adopted, and that we are to regard it as referring to the practice im-

mediately before this act, that is, from 1690 to 1712, then, according to Pardovan, on the call being subscribed by the electors, (the heritors and elders,) and given in to the presbytery, they did not appoint one of their number to moderate in a call by the congregation, nor to receive assents or dissents: they sustained the call by the electors, took the person called or invited on trials, and on finding him qualified, issued an edict and served it at the church, calling upon all to object if they have any thing to urge why the person chosen should not be admitted pastor of that congregation. Hence as the presentation by the patron, in terms of the act 1712, again just supplied the place of the call by the heritors and elders, which in 1690 had been substituted for it; and as on this call being abolished with the right of which it was the exercise, whenever a patron presented a qualified person, the presbytery was bound to receive and admit him in the same manner as the person elected and presented by the heritors and elders had been; and as, on sustaining their call, he was to be taken forthwith on trial, and not till the edict was served was the congregation, by any presbyterial act, invited to approve or disapprove, and if they disapprove, their reasons were to be given in and cognosced upon by the judgment and determination of the presbytery; so now the same course should have followed exactly on the presentation by the patron. There is clearly no warrant either in the act 1690 or in this act, nor in the practice following upon the former of these statutes, for any call by the congregation at large or heads of families, as a step in the admission of a minister into a benefice, or the constitution of the pastoral relation between the pastor and his flock, and it does seem singular how this form should have been introduced. It seems to have been in this way:—

It is said that for some time after the act of Queen Anne was passed reviving the law of patronage, the right was not much exercised by patrons. Now, as the heritors and elders had no longer the right to call a minister, if the patron did not present one, the congregation was the only party within the six months who could move in this matter, as the *jus devolutum* did not take place till after this period. Upon an application from members of the congregation, where the patron was not to interfere, it was natural for the presbytery to follow the former practice, and appoint a call to be moderated; those who were to give the call being now the congregation, instead of the heritors and elders only; and as it was to serve the same purpose as the call authorised by the act 1690, it of course obtained the same name, and took the same order in the admission of their minister, and was truly the first step towards constituting the pastoral relation, since the patron waived his right to present, and left the congregation to take his place in this matter. This was quite natural, and a very simple way of supply-

ing the failure on the part of the patron; it was a substitute for the exercise of his right. But as it was in consequence of a failure on the part of the patron to attend to the spiritual wants of the congregation, it seems very plain, that, when there was no failure on the part of the patron, and when he presented a qualified person to be minister, there was no room for the call of the congregation; the substitute for the presentation could not appear along with it, or compete with it, or even concur with it; and as there was no act of the Church requiring it in such circumstances, (supposing such a legislative measure within the power of the Church), for no act of Assembly has been pointed out as authorising or requiring a call along with a presentation, it was admitted without any warrant, and was illegal, as being contrary to what was clearly intended by the act 1712.

And, accordingly, although this may be the origin of the practice, it is quite clear that it was not held by the civil court or our institutional writers to be a legal or necessary step in the induction of a minister when presented by a patron. Erskine treats of patronage at some length, (B. 1, t. 5, § 50); and although it is well known that he was the friend and correspondent of Wodrow the Church historian,* who grieves so much over the evils of patronage, so that he would not have failed to recognise this right in the people so materially affecting the right of patronage, if it really had been sanctioned by law or usage at the time he wrote, yet he says not one word which can imply any such privilege being interposed between the presentation and admission. I shall afterwards notice a rather remarkable incident in his own parish of Carnock, which must have brought this matter most forcibly under his notice.

Bankton, however, does treat of it, and his opinion as to a popular call is clear. He says, (B. 2, t. 8, § 68), “ The late statute bears, “ That the presbytery is obliged to receive and admit the person presented, in the same manner as persons presented before the making of the act ought to have been admitted. Now, by the act 1690, the person named or presented by the heritors and elders behoved to be proposed to the congregation to be approved or disapproved by them, and if they disapproved, the presbytery were to cognosce and determine therein; it may therefore be doubted whether that method may still be followed.” Bankton argued as if the act 1690 may not have been repealed, so far as regards proposing the presentee to the people. He had not adverted to the practice, but imagined that the person named or chosen by the heritors and elders was proposed to the congregation immediately on being chosen by them, so that their approbation or disapprobation was simultaneous with, and reported to the presbytery with

* See Letter to Mr John Erskine 1718, in Appendix to Burns' Memoir of Wodrow.

the call. But he rejects the notion that the presentee required the approval of the people at this stage. For he proceeds thus,—“I conceive neither people nor presbytery can obstruct the settlement, except upon objections to the presentee’s life or doctrine, and that the method in the act 1690 is not now the rule. The manner mentioned in the British statute must be that *which took place formerly when patrons had the right of presentation*, they being restored to their ancient right; and if it were otherwise, the presbytery would have it in their power to set aside the presentation, upon suggestions from the people, which was not intended; nor did such method take place when the patrons presented in the purest times of presbytery.” He seems to have supposed, that, under the act 1690, the presbytery could have set aside the presentations before taking the presentee on his trials, on suggestions from the people, and therefore thinks the act in this respect is not to be observed, because this could only exist when patronage was abolished, and patronage could not be said to be revived if this still continued to defeat its operation. I think, however, that even if we are to look at the act 1690 as the rule for the duty of the presbytery in the admission of a minister, and if the same procedure is to be observed as under the act, only substituting the patron’s presentation for the call by the heritors and elders, as nothing then intervened between the call and the trials of the expectant, so nothing should intervene now between the presentation and the trials, and certainly not a call by the people, which Bankton holds is no step in the admission of a minister. Bankton wrote in 1752, and he was well entitled to hold this opinion, as it had been observed on the bench in the Dunse case 1749, (M. p. 9913), that “the mode-ration of a call was not prescribed by the law;” and a proceeding in the General Assembly at this time, to which I shall advert afterwards, must have satisfied him that the Church did not hold a concurrence by a majority necessary, if the presentee had every other qualification.

Nothing, I think, but a conviction that this was truly the state of the law, could have influenced the General Assembly to adopt the course which they followed. They did not hold themselves entitled to enact that a call was necessary as well as a presentation by the patron; on the contrary, I think they are distinctly contrasted in two acts of Assembly in 1758 and 1766, (Peterkin, v. 2. p. 113); still less did they conceive they had power to introduce a regulation which should give the right to *veto* the presentee arbitrarily, and without assigning any reason; but conceiving the interests of the Church affected by the act reviving the rights of patrons, and by another act passed about the same time, the first statute which sanctioned toleration in this country, and it was only to the effect of allowing Episcopal clergymen with English or Irish

orders to open chapels in this country, and intended to be more against the then Nonjuring Episcopal Church, than as encroaching on the privileges of the Established Church, the Commission petitioned against both acts; and by the Assembly, 1712, (Peterkin v. 2, p. 109), "the declarations and representations made by the Commission to Queen Anne, against the acts of toleration and patronage, are approved as most faithful and reasonable, and the representations are by order of the Assembly, *verbatim* inserted: and the Commission is empowered to advert carefully to the concerns of the Church in the above particulars, and are ordained to use all dutiful and proper means for obtaining redress of what is, or may be found therein grievous, and to lay hold on every fit occasion for that effect." And further, in 1715, "the Assembly approves of a memorial, setting forth among other things the evils and grievances of the church from patronages, and from the toleration as it now stands, and the said memorial is put into the hands of the Commission, who are enjoined to use all due means to obtain redress, and to send the same to the Secretary of State to be laid before his Majesty," (Peterkin, v. 2, p. 121). I believe that a similar instruction as to patronage was uniformly given for many years to the Commission, and was finally omitted only about 1784. Now, this shewed the opinion of the Assembly that patronage could not be crippled by a call, and still less by a veto from the people, legally at least; and while they petitioned the Crown to sanction a change in the law, they, in the hope that this might be effected, most unfortunately I think, in carrying through settlements by presentations (Sir H. Moncrieff, p. 83), continued to observe the *old forms* (now inapplicable), because it always kept alive the notion among the people, that they were entitled to elect their minister as if the right of patronage had not been restored. But, what was greatly worse, in preserving the *form*, they entirely changed the *substance*. They transformed the call by the heritors and elders into a call by the people; what was in fact the presentation by the electors, they converted into a call by the congregation, in addition to, and in concurrence with, the presentation by the patron, which had again assumed its former place in the appointment of a pastor, as a substitute for the call which for a few years had displaced it. It was thus not only continued contrary to the provision and plain meaning of the legislature, but, if it was to be operative at all, it was entirely changed in its nature and character. If the voice of the people concurred with the presentation, it was well, and a most desirable result; in such a case, however, surely quite unnecessary, except to give a notion of a right which did not legally exist; but where few only subscribed the call, if the church courts had acted on the notion that this prevented them from proceeding to take the pre-

sentee on trial, this would have been controlling the right of patronage, and in effect abolishing it at their own hand and by their own authority, at the very time they were annually petitioning for its removal, by the only competent power—the Legislature. Accordingly, the great majority of the church at that time, felt it their duty to adhere to the conditions on which the Presbyterian Church had been sanctioned and established, and that it would be inconsistent with the character of a religious society to attempt to get rid of any restrictions upon their privileges, or the supposed rights of the people, by any fiction or subterfuge; being guided also by the practical wisdom of that most eminent man and ornament of the Church, who, as the historian of Charles V. and of Scotland, was intimately acquainted with the principles of the Reformation, and the views of the Reformers both abroad and in this country, the Church never attempted to introduce a law inconsistent with the legal rights of patrons, either by direct enactment, or by judicial determination. On the contrary, the decisions of the Assembly almost uniformly supported the law, where the inferior judicatories of the Church had violated it. Nothing but the conviction that they had no power to control the patron's right, by the introduction of the congregation before taking the presentee on trial, could entitle them to do so, or justify their proceedings, when “the principle was ultimately avowed and adhered to, that a presentation to a benefice was in all cases to be made effectual, independent of the merits of the call or concurrence.” (Sir H. Moncrieff, p. 83). Nothing but the sincere conviction that such was in accordance both with the law of the land and the law of the Church, could have influenced them. It could not arise from any dereliction of their duty in not maintaining the supposed rights of the people, for they petitioned yearly against patronage. But they were satisfied that the law as it stood, left for them nothing but the necessity of giving effect to the law of patronage, till an alteration should be obtained from the Legislature. To think otherwise would be the grossest libel upon the Church.

But although during the period of more than a century, the Church laboured by remonstrances to get rid of patronage, acting on the principles of Wodrow, who, though no man could be more decided than he was on the “unreasonableness and unscripturality” of the law of patronage, “did not think it either right or expedient to resist the execution of the law, by popular force or by ecclesiastical insubordination,” (Memoir of Wodrow, by Burns, p. 5), it is now held that redress was always within their power, to a certain extent at least, by internal regulation; so that although by their own authority they could not abolish patronage (a power which at no period was ever claimed by the Church), at least they could give the people such a control over it, as in effect to give

the right of nomination to the heads of families, or at least to let it fall to the Presbytery. For it is now said that the Church has a legislative power sufficient for that purpose, and that it is within their province to declare and enact the *veto*.

It is true the Church has legislative powers. In this respect, it resembles a corporation or society which has the power of making bye-laws for its internal government and regulation. But the Church holds this power on a still higher footing, and in this respect is altogether unlike an ordinary corporation. A corporation derives its existence and its privileges solely from the sovereign or executive power. The Church has a different origin. None of your Lordships can carry your notions higher than I do, as to the power of the Universal or Catholic Church as a spiritual body, and independent altogether of the State, for making laws relative to its constitution, ceremonies, polity, or confession of faith, binding on its own members, and to be submitted to as a test of membership, and enforced by ecclesiastical discipline. It is from a higher source than the temporal power that the Church derives its existence and rights; no less than from that Power "which gave Christ to be "Head over all things to (*i. e.* to the benefit of, Whithy) the "Church, which is his body." Yet exalted as its origin, its dominion is but spiritual, and its legislative powers thus far limited; and care must be taken to keep their exercise within such limits that no civil right be affected by any law of this spiritual body, and obedience to its decrees can only be expected from its members. But when this independent society asks not toleration merely from the civil power, but establishment; when it claims tithes, and permission to acquire property; demands authority to levy contributions for ecclesiastical purposes; requires enforcement of its decrees in support of its temporal rights; above all, when for those within its pale, it calls upon the State to sanction its sentences of excommunication by the pains of rebellion (as was done by 1572, c. 53, and 1640, c. 15), and for those without, insists that all other forms of religion shall be put down, (a claim carried so high, that our stern Reformer loudly denounced it as a crying sin, that his unfortunate Mistress, then only unfortunate in having been called to rule such subjects, and not as yet chargeable with the crimes afterwards imputed to her, should enjoy the unmolested privilege of worshipping in her own private chapel after the manner of her Fathers, and according to her conscience;) or in the words of the oath prescribed to King James and his successive Regents from the time of the Reformation, that they "shall abolish and gairstand all false religion contrary to the "same," in furtherance of an act (1567, c. 5), by which hearing the mass, the only other form of religion then known, was punishable by banishment, a repetition of the offence, with escheat and corporal pains, and for a third offence, the party was liable to a capital sen-

tence ; and on the establishment of the Presbyterian Church, even the receivers of such were, by 1593, c. 168, made liable to the same punishments :—if the State agrees to recognise and establish the Church making such claims, it may do so on such conditions as shall be thought just and expedient. The Church may retain its independence if it please ; but if it accept adoption by the State, it must accept it according to the conditions on which the State is willing to grant it. Still this is far from saying that it has no power but from the State. Its inherent spiritual power still subsists, but this may be restricted by mutual consent ; and the same consent may give the Church the privilege of affecting the civil rights of its members ; here, of course, such authority *is* derived from the State. No doubt, then, the Church has legislative powers ; but this is not enough for the solution of the present case, it must be shewn that her legislative powers have not been exceeded in this act anent calls ; for I fear it cannot be contended that the Church has never exceeded her own legitimate jurisdiction in the acts passed by the General Assembly.

It is true I can conceive an excess of power by the Church in a matter so purely ecclesiastical that it may not be competent for this Court to check it, and where it would be necessary to resort to the Legislature to obtain a remedy. If the General Assembly were to make an alteration in the Confession of Faith, and, instead of Trinitarian articles, introduce Socinian, or the Neology of Germany, and if they were to insist on their elders subscribing it before admission to that office, I think the civil court could not interfere. Again, if *jure devoluto* they were to appoint a minister to a parish, and require of him subscription to the new Confession before giving him collation, redress I think could not be obtained from the civil court. But as, by an act passed at the Revolution, professors of universities are bound to subscribe the Confession of Faith, if the General Assembly insisted that he must subscribe the new Confession, while the professor elect scrupled to do so but professed his willingness to subscribe the Confession 1690, I have not the slightest doubt that we could authorize his reception by the university on his subscribing that Confession, and would arrive at that conclusion in a declaratory action against the Senatus, by finding that the General Assembly had exceeded their powers in making an alteration on the Confession of Faith without the authority of the State ; that it was *ultra vires* and illegal, and that the people were not bound to adopt it. Our jurisdiction in this matter would have arisen because a civil right was affected by it. Now, make the further supposition that, in proceeding to receive and admit a presentee on a presentation by a patron, a presbytery, under the instructions of the General Assembly, required of the presentee subscription to the new confession, and that the patron and presentee objected to it, the patron having presented him on

the express condition that he should adhere to and preach the doctrines of the Confession 1690; suppose the presbytery then declined to take him on trial, and rejected him on this ground, would not the patron's right of patronage be affected by this proceeding, and would he not be entitled to seek redress from this Court against this refusal to give effect to his presentation, this invasion of his civil, and the presentee's patrimonial right? For against any excess of power which affects the civil rights of any individual or body of men, it must be not only competent to, but the bounden duty of the civil Court, as the authorised protector of the civil and patrimonial rights of the people, to give redress. I cannot conceive that if the Church act *ultra vires*, and to the injury of a civil right, the Supreme Civil Court of the country cannot give protection and redress against a usurpation of power, even by the Church. And my opinion unquestionably is, that they have proceeded contrary to law, by interposing a *veto* by the people between the presentation of the patron and the trials by the presbytery; because this is directly contrary to the express injunctions of the act 1712, to which they are bound to give obedience as long as they are connected with the State, and receive endowment under its authority; and that their legislative power does not extend so far as to alter or abrogate this act of the Legislature. If the General Assembly had power in 1834 to declare, that it is only the full effect of a fundamental law to give a *veto* to a majority, why may not a future Assembly declare that the dissent of a third or any smaller number has the same effect, till they enact, that the dissent of one member destroys that full assent which is implied in a minister not being intruded against the will of the people? Is it possible to hold that this is within the power of the Church while connected with the State and endowed by it, which supports the rights of patrons as one of the conditions of its endowment and protection?

A justification of the act anent Calls has been sought in this, that the Church has defined the qualifications they will require in a presentee. Now, when the law says that the patron is to present a qualified person for the ministry, or, as described by Balfour, p. 504, from the Canon Law, "ane qualified and habil persoun, "of sufficient literature, honest in life, and of gude maneris;" and that it also prescribes that the Church is to take trial of these qualifications,—it is not unfitting, but beneficial to the patron, that the Church should define the qualifications required by them, particularly those that are arbitrary, such as sufficiency of literature. Neither is it unreasonable, but the reverse, that candidates for the ministry should undergo a previous examination as expectants or probationers. All this is in favour of the patron, has been acquiesced in, and could not reasonably be objected to.

But, if the supposition may be made that some very unneces-

sary and absurd requisites were prescribed as an indispensable qualification in a presentee before being taken on trial as to literature and soundness of doctrine, I cannot doubt that this Court could interfere in order to protect the just and ancient rights of patrons; and I should never anticipate that the Church would adhere to their own regulation, after it was declared an illegal encroachment on the patron's rights, by the Court competent to decide on their civil rights, and bound to protect them. The Church, I think, would just as little resist such a declaration by this Court, as they did in a somewhat analogous case. A sum of money had been mortified to found a certain number of divinity bursaries in Marischal College, Aberdeen. A regulation had been made that no bursars should be received into the College without a certificate from their presbyteries. This was with the view of having better qualified candidates for the ministry, and might have been held as the initiatory step in their divinity education, and thus it might have been thought within the province of the Church to regulate. But Sir Alexander Ramsay, the patron of these bursaries, objected to this, as interposing a requisite from a third party between his presentation and the reception of the presentees into college, and the education to which his presentation entitled them; and, accordingly, this Court found that the professors could not refuse his presentees, for not having certificates from their presbyteries, (28th July 1736, *Elchies v. Jurisdiction*, No. II); and the Church never thought, after this judgment, of enforcing this regulation, by refusing to take such Bursars on trial as probationers, or when presented to a church.

At one time the Church attempted to secure a control over patronage, since they could not get it abolished, by enacting (1596, Calderwood, p. 315), "that none seek presentations to benefices without advice of the Presbytery within the bounds whereof the benefice is, and if any do in the contrary, they shall be re-pelled as *rei ambitus*." This is approved and re-enacted by the Assembly 1638. (Acts of Assembly, p. 36.) There is one instance in 1597, and another in 1602, where this charge was made against a presentee, but the result in the first is not stated, and in the other the presentee was acquitted of the charge. (Report on Patronage, p. 373). Now, suppose it had been sustained, and the presentee had been rejected on this ground, would it not have been an invasion of the rights of the patron to reject a presentee, irrespective altogether of his qualifications for the ministry, and without taking him on trial, merely because he had not in the first instance sought permission of the presbytery to accept of the presentation? To make such a regulation limiting the choice of the patron, thus affecting a civil right, was an excess of power on the part of the Church, and it would no doubt have been so declared by the Court, if a patron had found his presentee rejected on this ground.

In the year 1719, the last statute on the subject of patronage was enacted, and by this it was declared that a presentation must be accepted by the presentee, before it is given in to the Presbytery, otherwise that it is void and null. Some persons thought that patronage might be got the better of through the means of this statute, and, accordingly, it was referred by the Assembly 1724 to their Commission, "to consider what is proper to be done as to ministers and probationers, who shew a willingness to accept of presentations from patrons," and "to propose an overture hereupon to the next Assembly." Now, suppose the Commission had recommended, and the Assembly had declared, that it was unlawful to accept of a presentation, and that they would not receive any such presentee to his trials, would this have been within the power of the Church? There were not wanting at the time those who urged the adoption of this measure (*Modern Erastianism Unveiled*, by Bisset, p. 123, 237); and if it had been competent for them to do so, patronage would have been got rid of at once. Yet this would not be interfering more with the rights of the patron than the veto act does, and it might have been defended on exactly the same grounds,—that it is a step in the constitution of the pastoral relation between the minister and his flock, and of course falls within the competency of the Church to regulate. But no such regulation was ever attempted. It would have been directly in the face of the act 1712, which required presbyteries to receive and admit a presentee as formerly; and this Court would surely have been entitled to have declared that such a regulation was contrary to law. If it would be competent for the Court in such a case to interfere to prevent such an encroachment on the right of patrons, I own I do not see the distinction which should prevent the Court from interfering regarding the veto act.

In short, the Church must not exercise any legislative powers beyond what is competently within their jurisdiction: care must be taken not to trench on any civil right: and although, having the trial of the qualifications of presentees specially committed to them, they may define the rules on which they will act, and the moral and literary qualities they will require, I cannot see how this should entitle them to put out of their own hands the power to try him, and allow others to prescribe to them that they shall not try his qualifications? If this be a new proceeding altogether, never known or recognised by the Church, can it now be introduced by the authority of the Church alone?

Suitableness or meetness for the situation, may be among the qualifications of a presentee which the church may inquire into, besides examining into his life, literature, and conversation: but then they must inquire into this matter themselves: it must be the subject of trial by them. They are not entitled to say that

they will trust to the blind, perhaps prejudiced, dissents of a majority, that the presentee is not fit for the charge, or rather that he is not acceptable to the people. It is the presbytery who in such circumstances must decide, and not take the decision of another body that he is qualified or meet for the parish, for of this *they* must be the judges, and not the people. It is to the presbytery that the State, in concurrence with the Church, has entrusted the duty of examination of *all* the requisite qualifications. If the people can allege no ground of rejection, they are held in duty bound to concur, and not entitled to dissent. But this seems a decisive proof, that this power of dissenting arbitrarily, and without sufficient reasons, is no part of the call as admitted in the Church, and that because a call may be ecclesiastical, and beyond the power of the civil court, this also must be reckoned so, that if it was merely a mode of ascertaining a qualification requisite in a presentee, the regulation would have been general, in the case of every minister who is to be inducted into the parish. If a call is a necessary step in the constitution of the pastoral relation, it must be so in every such act; and if this be a mode of ascertaining a portion of the qualifications of the presentee, it must be so in every case of induction. But then, why is it that when the presbytery present *jure devoluto*, there is to be no such test of his qualifications by an invitation to the people to dissent? The presbytery ought to take this qualification into account as well when they themselves nominate, as when the patron presents. The patron may have a tutor or dependent to provide for; the presbytery cannot but have a son, or brother, or nephew, of one of themselves, looking for a church. Is not acceptableness to the people as likely not to be the first thought in the appointment, when made by the latter, as when made by the former? The act 1834, however, declares the presbytery are not, when they nominate, to adopt this test of qualification; it is only in the case of a patron presenting that this new law is to operate. Is it, then, any thing else than a limitation on the patron's right, applicable to him alone? It is not a step universally applicable in all cases, which it would be, if it were a mode of ascertaining a requisite qualification; it is peculiar in this single case, and with a view to affect the patron's power in presenting. The *veto* act, then, cannot be defended on this ground. For the Church has, in the case of patronage alone, deprived themselves of the power of judging of this qualification of meetness, by giving it absolutely to a majority of the people; and it is absurd to say that the presbytery commences the trial or examination of the presentee, or exercises any judicial act, when, on seeing a majority of dissents, they decline to inquire into his qualifications for the charge. The objection is not so much that presentees are to be tried "if they be qualified for the places to which

“ they are presented,” (Acts of Assembly, 1639; Peterkin, v. 2, p. 213); as that they are not tried, the *veto* preventing the trial which the presbytery should go into, along with his other qualifications. And this is quite new in the practice of the Church. For I think it has not been hitherto noticed, that at a time when the Church is held to have been under its purest form, and guided by those highly lauded men who assisted in drawing up the Westminster Confession of Faith and the Directory, such qualification was to be inquired into, but then this was to be done by the presbytery. For, in 1642, an act was made explaining the above act 1639, and confirming it, declaring that the minister is to give “ such satisfaction to the parishioners and presbytery in preaching, as the presbytery finds his gifts fit and answerable for the condition and disposition of the congregation where he is presented; because, some that are meet for the ministry in some places, are not meet for all alike, and some places require men of greater abilities than will be required in the planting of a private small parish,” (Pinkerton, v. 2, p. 214); and then it is added, “ the leaving of the consideration of these places to the judgment of the presbytery, was the only intention of the act.” Thus it was the presbytery who were to judge of this meetness of the presentee, as well as of his gifts being answerable to the condition and disposition of the congregation. It was not the congregation themselves who were to be the judges of what pastor would suit their condition. Their disposition might be relaxed in morals, or infected with antinomian error, or Socinian principles: left to themselves they would select the candidate who would flatter them, and confirm them in their errors, and *veto* any whose doctrine opposed their inclinations and their tastes. It must be the duty of the Church Courts, if the nomination fell to them *jure devoluto*, to give them a minister answerable for their condition, just the very opposite from him who would be their choice; and can the Church, or ought they, in order to impair the patron's right, interpose the *veto* by a majority of the congregation, on the trials of the presentee following immediately upon the presentation. Such was not in contemplation of the Church in 1642; the Church judged of the fitness for a parish, and not the congregation. It is entirely a new law, and it seems impossible to defend it on the plea of its being a part of the trials, and a legitimate mode of enabling the presbytery to judge of part of the qualifications of a presentee.

It is admitted on all hands that patronage is a civil right, and that no act of the Assembly can affect a civil right. Now, the question is, does the act 1834 affect the patron's right? Surely it does so most essentially, when it interposes a power between the presentation and the presbytery, which forbids the presentee being admitted to his trials; whereas, ever since the Reformation, the

patron was entitled to call upon the presbytery to see if he had presented a qualified person, and there never was any impediment from the people to the presbytery proceeding to discharge this duty. The patron's right is thus most obviously affected; this the Church can have no power to establish by enactment, so long as it is recognised as the law of this country that presentation to a benefice is one of the rights inherent in patronage; * and besides, it is contrary to the express provision of the statute, since the presentee's admission does not now take place in the same manner as the persons presented before the act 1712 ought to have been admitted; for there the trial and admission followed the election, without the interposition of any other proceeding whatever, which could hinder the presbytery from taking the presentee on his trials.

If it be thus contrary to law, the Church ought not to attempt, by any internal regulation, to set this law aside. No corporation or private society can establish a bye-law which is contrary to the law of the land: and the Church can have no higher power where civil rights are concerned. It is remarkable that they never did, by any act of Assembly, enact that a call by the people, along with a presentation, was necessary; and the declaration in 1782, that the moderation in a call is agreeable to the immemorial and constitutional practice of the Church, has been characterised as "loose and unguarded," and can only be considered as one of those rash ebullitions incident to a popular assembly, composed of such ambulatory materials as the General Assembly, when excited by some popular feeling, which disdains to listen to the voice of the most experienced and best informed of its members.

But supposing a moderation in a call, though neither immemorial nor constitutional, sanctioned by usage; must not this usage regulate its influence and effect? Can usage be resorted to as the only ground of the practice, and then, under the pretence of carrying it into full effect, is it competent to enlarge it, to alter it, to import an entirely new principle into it; and instead of being a simple form, beneficial if it shews a general concurrence with the presentation, harmless if it does not, to make it now an utter extinguisher upon the presentation and the presentee's rights? instead of being a call or invitation, making it the vehicle of dissent and disapprobation, giving to a majority of the people a *veto* as absolute as that of the Tribune of the people at Rome, or the veto of the Polish Diet? This, I think, is contrary to the best established principles of our law. The Court have frequently checked royal burghs and other corporations, in their attempts to extend their privileges beyond the usage which sanctioned them;

* This observation is made in consequence of an opinion set forth by Wodrow, that the civil rights of patrons do not comprehend the right of presenting. History, vol. i. b. 1. ch. 3. p. 265.

and there must exist a power to do the same as to the Church, wherever the extension of a usage interferes with civil rights, and this power must reside in the Supreme Court. That it is an extension beyond the previous practice is indisputable. It is said that it is with the view of giving full effect to a principle. The same plea would warrant every extension of a usage. But such a plea is never listened to in cases of civil corporations extending their privileges; neither can it, in the case of this ecclesiastical society, in a matter which affects civil rights, and which therefore admits of correction by the Civil Court.

Although, as I have already said, it appears to me that, for the decision of this question, it is not necessary to go back in the history of the Church of Scotland, beyond the period of its settlement at the Revolution; yet as both parties think otherwise; and in the able discussion which this important case has elicited, have gone back to the period of the Reformation, tracing the law and practice of the Church downwards for more than two centuries and a half, I have no objections to follow them in this course; and I am fully persuaded that the further this historical inquiry is pursued, if pursued with the requisite knowledge and impartiality, the more the illegality of the recent enactment of the Church will be made to appear.

This review will lead to the following subjects of inquiry:—

1. Whether it was a fundamental law of the Church, observed in practice and acted upon, that no pastor shall be intruded on any congregation contrary to the will of the people?

2. To what effect this law was ever admitted to limit or interfere with the patrons' right of presentation, and to what extent was the right of the people to object admitted?

3. It will elucidate still further the history of the popular call in the Church of Scotland.

But before going into this inquiry, I wish to submit this observation, that if it had appeared to have been the practice of the continental Reformers, those great and illustrious men who broke the fetters in which the Church of Rome had enthralled the human mind, and who freed so large a portion of the world from the debasing superstitions of her corrupted creed, if *they* had asserted the right of the people to choose their pastors, and introduced this into the general practice of the Reformed Churches, I would indeed have lamented that a different rule had been adopted in this country, and must have grieved to think that our people had been abridged of a liberty permitted to other nations. But so far as I have been able to ascertain, the right of patronage has been uniformly established in every Reformed Church, and the privilege of the people is only the right to object to the life or doctrine of the pastor proposed to be set

over them, such objections being given in after the Church has received the presentation, satisfied herself of the qualifications of the presentee, and proposed him to the congregation for acceptance previous to ordination. The Reformed Churches have differed, as is too well known, in polity, in doctrine, in ceremonies, in greater or less subordination to the civil power, in vestments, and in many other more trivial matters, supplying to the eloquent Bossuet the vantage ground from which he makes the most powerful attack which has ever been made on the Reformation. But as to patronage their practice is uniform; and amidst so many differences, this uniformity is a very remarkable feature in the history of the Reformation.

I beg permission to occupy the time of the Court for a little space, to point out a few of the particular instances which go to establish the truth of this statement.

In Sweden, the Reformation was established in 1529, Gustavus Vasa placing himself at the head of it, and bringing it temperately about. Episcopacy was continued. The king appoints the bishops, and the bishops, each in their diocese, appoint the inferior clergy. (Gerdesii Hist. Ref. v. 3, p. 312, 319, and App. p. 195.) In Denmark the Reformation was introduced also by the king, but it was resisted by the Church. The king, however, prevailed; having arrested their seven bishops, he kept them prisoners for life, and in their stead appointed Superintendents. These Superintendents had the power of ordination in their dioceses; are termed by the historian, *Superintendentes seu Episcopi*, and on the death of the Popish bishops, that name was resumed by them. The king enjoys the patronage. (Gerdes, v. 3, p. 411.) In England it is well known that patronage was continued at the Reformation, the people having only the privilege of objecting to the life or doctrine of the presentee previous to ordination.

The Protestant States and Cities of Germany followed the same practice, adopting the Latin synonym of superintendent instead of bishop, which denomination they did not choose to assume among the Prince Bishops of the empire: and here, too, patronage excluded the people from the choice of their pastor. A very early notice of this appears in instructions which, in 1528, were drawn up by Melancthon and revised by Luther, for a visitation of the Saxon Churches, containing also a summary of the doctrines they were to enjoin the clergy to preach. Luther and Melancthon were both named among the visitors. The instructions bear, "*Considerare etiam monentur Visitatores, an ex beneficiis, quorum collatio ad nobiles vel privatos spectat, pars quædam, tertia fortè, seponi, et ad sublevandam patronorum, si quæ sit, egestatem, aut ad adjuvandum adolescentium studia literaria, vel ad elocandas patronorum filias, impendi possit.*" (Seckendorf de Lutheranism, lib. 2. § 36,

p. 101.) This visitation took place and its good effects are noticed, Gerdes, v. 2, p. 187.

The constitution of the Reformed Church of Brandenburg, published by the elector in 1540, bears this notice, “Jura patronatus omnibus conservat, ad quos de jure spectabant, sed nominatos Superintendenti a se constituto ad explorationem sisti jubet, deinde pro more ordinari.” (Seckendorf, lib. 3, § 75, p. 240.)

The scheme of reformation written by Bucer and Melancthon, and published in 1543, in name of the Archbishop of Cologne, but which he had not power to accomplish in his Electorate, bears, “De vocatione ministrorum Ecclesiæ agnoscit ante omnia, quâ diligentiâ sibi ut episcopo, curandum sit, ut cœtibus pii et docti pastores præficiantur; idem Patronis in nominatione observandum commendat.” (Seckendorf, lib. 3, § 108, p. 447.)

In the duchy of Brunswick, it was enacted in 1543, “Pastores aut ministri Ecclesiæ a Senatu et Præfectis Ærarii Ecclesiastici, aut a Patronis ad quos id pertinet, eligi, et Superintendenti ad examen et ordinationem præsentari, scholarum magistri a concionatoribus cum concilio et consensu senatus, constitui jubentur.” (Seckendorf, lib. 3, § 109, p. 449.) And it was the senate which had established the first reformed ministers there, in 1528. (Gerdes, vol. 2, p. 198.)

In the scheme of reformation drawn up in 1545 by Luther and his colleagues at Wittenberg, among whom are Melancthon and Bugenhagen, in obedience to the appointment of the Diet of Spire, it is said, “Cumque petitur ab Episcopis ordinatio, maneat tamen suum jus Patronis, vocandi idoneos, eosque præsentandi, ut vocant.” (Seckendorf, lib. 3, § 119, p. 533.) Your Lordship cannot fail to remark, that here the presentation by the patron is termed *vocatio*. In the discussions which took place upon it afterwards at the diet, Luther and his colleagues say, that this article may be more correctly expressed thus—“Restituta Episcopis ordinatione, jus Patrono cuique maneat nominandi et præsentandi quod ab antiquo habent.” (Seckendorf, p. 538.)

Bucer, an eminent name among the reformers, and who was much impressed with the negligence of the bishops in Germany in their selection of the inferior clergy, gave in a formula also to the diet; but while his proposal is to take from the bishop the power of naming the inferior clergy, he does as little as the others propose to vest any right in the people to elect their pastors. His suggestion is, that the Ordines Imperii should appoint inspectors who might, *supienter et pie*, inquire into the qualifications of ministers, and appoint them throughout the whole of Germany: or if that could not be effected, at least that to each prince, within his jurisdiction, should be granted the power to commit this office to worthy men. (Seckendorf, lib. 3, § 120, p. 541.) So that though

he was for withdrawing the power of nominating the inferior clergy from the bishops or superintendents, he never thought of bestowing the right of nomination upon the congregations, but proposed either a general committee named by the diet of the empire, or at least that each German prince should have the power of nominating a special committee for this purpose within his own principality.

I am quite aware it will be said these are Lutheran churches, or formed upon their model, and that the reformation of the Church of Scotland proceeded after the pattern of what are termed the best reformed Churches, and to their practice alone in the present inquiry we should resort, if we are to seek a pattern for our reformers. I am content to accept of this challenge. Let us go at once to Geneva, the fountain and source of our reformation. And it is fortunate that we have perhaps the most authentic and the most minute account of the polity of the Church of Geneva, which exists of any church at the period of the Reformation, and from the pen of the great reformer himself. For in answer to a request of a friend from Treves, who was anxious to encourage the reformation in that electorate, and who had requested Calvin to explain *Leges Consistorii vestri*, he, in the year 1560, and hence thirty years at least after the reformed faith had been fully established at Geneva, writes thus in reply—"Primum, eliguntur ministri a nostro collegio; ac datur illis Scripturæ locus, in cujus interpretatione specimen suæ dexteritatis edant. Deinde examen habetur de præcipuis doctrinæ capitibus: tandem coram nobis ut apud populum concionantur. Adsunt duo ex Senatu. Si probatur eorum eruditio, eos senatui cum testimonio offerimus: in cujus arbitrio est non admittere, si minus idoneos judicent. Quod si recipiuntur (ut semper hactenus contigit) tum nomina promulgamus coram populo, ut si quod vitium latuerit, liberum sit singulis ante octo dies promulgare. Qui tacitis omnium suffragiis probantur, eos commendamus Deo et Ecclesiæ.—Genevæ, nonis Novembris 1560." (Calvini Epist. p. 142, Gaspari Oleviano.) Nothing can shew more distinctly than this, that the appointment of the clergy at Geneva was with the Senate, and the proposing of them with the Church; and to the people was left only the power to object to their life and doctrine, after their trial by the Church, and approval by the Senate. I shall have occasion afterwards to refer to a very important letter from Beza, the successor of Calvin in the Church of Geneva, shewing that the same order was also followed in his time.

The Protestant cantons of Switzerland followed the example of the other reformed churches in this particular. The senate is supreme in ecclesiastical affairs in Zurich, where the reformed faith was first established, in 1523, by Zuinglius (Sleidani Hist. Ref. p. 57), and the clergy there as well as at Berne are under the superintendence of an Antistes, chosen, as the other clergy are, by

the respective senates. Nothing can shew more distinctly that the reformers of Switzerland never dreamt that it was the right of the people to choose their pastors, or to interfere by a veto or otherwise in the election or calling of a minister, than the singular arrangement which took place in two instances as to this matter. The canton of Basle is Catholic, and the Bishop was the sovereign; but in the valley of Munster, which is a part of it, the reformed religion is established. Having no connection with the bishop, and being independent of his authority as a churchman, it might be expected that the people would have some vote in the choice of their pastor; but this is not so. This district is in alliance with the powerful Protestant canton of Berne, and, in ecclesiastical matters, is under the superintendence of the Antistes of Berne; and in return for this protection, Berne approves of the nomination of the ministers to vacant benefices, some of whom are appointed and paid by the bishop, and others by the chapters of two churches, according as the bishop or chapters possess the tithes in the respective parishes. The nomination is thus by the Romanists, but must be approved of by the Protestant senate of Berne. The people have no voice in the matter. (Coxe's Tour in Switzerland, vol. 1, p. 195.) And in like manner Soleure is Catholic, with exception of the single bailiage of Buckenberg, which is reformed. In ecclesiastical matters, this small district is also under the protection of Berne. The senate of Berne nominates to the vacant benefices, but the pastors must obtain confirmation from the chapter of Soleure (this was arranged in 1681). A deputy from Berne presents the minister to his parishioners, but the bailif is to be present at this ceremony as deputy from the republic of Soleure. (Coxe, vol. 1, p. 216.) Thus the people have no voice in the nomination of their pastor, although the circumstances might have been thought favourable to the acquisition of such a right.

The establishment of the Reformation at Strasburg affords another illustration. For so early as 1529 (Sleidan, p. 116.) the mass was abolished there, and the Bishop, who was the sovereign, was driven from the city. Calvin was pastor there in 1538 (p. 241.) before he settled at Geneva. At last, in 1549, an agreement is made (p. 485.) between the bishop and the senate on behalf of the Protestants, by which the bishop was allowed to return to Strasburg; his magnificent cathedral and two other churches were assigned to him and those who adhered to the ancient faith; while the church of St Thomas and the other churches of the city were retained for those of the reformed faith. The senate of the city had the patronage of these.

Let us turn next to a Church which stood in a different situation, being merely a tolerated and not an established Church, and

where the clergy were dependent upon the contributions of their flocks without any legal right to support from them; it might well be supposed that, in a Church thus purely voluntary, the people's right would be readily conceded. I allude to the reformed Church of France, tolerated by the edict of Nantz, and long a very flourishing Church, having held no less than twenty-nine national synods, between 1559 and 1659, and enacted laws for its government. It is repeatedly referred to by Pardovan as a sound model of a Presbyterian Church, and its constitution and decrees seem to have been much kept in view by our reformers. Now, were the people in this merely tolerated and voluntary Church permitted to choose their pastors? Was this a privilege which they either claimed, or was such conceded to them? If this privilege were to exist any where, it might be expected in such a Church as this. But no! there the rule was, that a minister was chosen for a congregation by the provincial synod or classis (which is equivalent to our presbytery), except in times of difficulty, or cases of great necessity, when he may be chosen by three pastors, together with the consistory of the place; and after the synod or classis hath examined any minister-elect, they shall notify his election by their act to the church whither he is to be sent. He is then to preach on three Sabbaths to the congregation, "and they are charged, that if any one know any impediment for which his ordination should not be completed, or why he may not be accepted, that they do come and give notice of it to the consistory, which shall patiently hear the reasons of both parties, that so they may proceed to judgment." This much, however, was conceded in this unestablished Church; that although the minister-elect be justified in synod against all impeachments brought against him by the people, yet shall he not be given as pastor to that people against their will, nor to the discontentment of the greatest part of them. (Bingham, *Eccles. Ant.* vol. 2, p. 801). So the people must state special objections and prove them; but although they should not be able to substantiate them, prudence suggested, where no rights of patronage were affected by the determination, that if they remained obstinately impressed with the truth of the impeachment, the Church should provide them with another pastor, and the minister-elect with another church.

Let me advert next to another Church in similar circumstances, by far the most flourishing reformed Church which existed any where, which did not ultimately become the established religion of the country. I allude to the Protestant Church in Hungary. Notwithstanding its sufferings and oppression in the seventeenth century after Hungary became subject to the house of Austria, it is yet at this day a very considerable Church. (*Townson's Travels*, p. 181; *Walsh's Journey from Constantinople*, p. 369). It is

peculiar in this respect, that there are in it two well ordered churches, adopting the principles of the Reformation; for differences having arisen between the reformers of that country, as in other countries on the continent, on the subject of the sacrament, and an attempt having been made in vain to come to an agreement, John 2d, King of Hungary, addressed a letter, *Superintendenti, Decanis, et Pastoribus* of the Hungarian Protestant Church, in 1546, recommending them to form distinct Churches. (Lampe, *Hist. Eccles. Hung.* p. 123). They followed his advice; and the Lutheran Church, adhering to the confession of Augsburg, and the reformed Church subscribing the confession of Helvetia, continue distinct to this day. What is also remarkable, they both adopted the same form of polity: the reformed Church being under the government of five superintendents, each with several seniores or deans, and pastors under them (Lampe, p. 564, et seqq.), with the exception of one district, where there are no superintendents, but seniores only, who, however, are permanent church officers (Lampe, p. 295), one of which is elected annually to hold synods like superintendents. The Lutheran Church has the same superior church officers, superintendents, and seniores, over the pastors. (Lehmanni, *Hist. Rel. Evang. in Hung.* p. 24).

The superintendents and seniores are elected by the Church in their synods, and the seniores choose and ordain the ministers for the congregations under their care. (Lampe, p. 295, 722, Lehman, p. 25.)

It seems to have been established in 1576, as the custom in one district, under the reformed Church of Hungary, but I do not observe it in any other, to inquire of the people, at the end of the first year, if they had any objection to their minister continuing with them? and if within a week the congregation did not enter into an engagement with him, "*Pastor seniolem accedat, veniamque alio transmigrandi impetret. Contemptui enim sacrosanctum ministerium non est exponendum, nec invitis ecclesiis nos obtrudere debemus.*" (Lampe, p. 299.) The election of his successor was not, however, in the people.

In a national synod of the reformed Church in 1646, a greater privilege (Lampe, p. 413), in this respect, seems to have been given to the people, provided their choice was approved of by the Church. But at the time of the Reformation, which is the position I undertake to establish, the practice in Hungary was similar to that of other Protestant Churches, in regard to the place which the people held in the choice of their pastors, although it was merely a tolerated and voluntary, and not an established Church.

I shall only refer to one other reformed church, the Dutch Calvinistic Church. The ecclesiastical laws for Holland and Zealand,

set forth in 1577 in name of the Stadtholder and States of Holland and Zealand, enact, that "the magistrates of every chief town shall, upon the information and with the advice of the ministers, choose ministers for their chief town, and for all other places under their jurisdiction." He is to be examined, "whether he be endowed with sufficient learning, eloquence, and above all, whether he be of such an upright and pious conversation as becomes that holy office. Being thus qualified, he shall be presented to the magistrate for his approbation, in order to his preaching to the people."

"But before any person shall be admitted into the pulpit, his name shall be published from thence three Sundays successively, to the end that if any man has ought to object against him, or can shew any cause why he should not be admitted, he may have time to do it." (Brandt's Hist. of the Reformation, v. 1, p. 318.) The States, in their reasons for establishing these laws, after observing "that godly rulers have always appropriated to themselves a right of making laws about religion is out of dispute," thus proceed; "Now, the reason why we have committed to the civil magistrate the authority of choosing ministers (by which we make the pastorship subordinate to them, as are all other offices) is, because the pastorship is of the nature of those offices that receive their stipends or wages out of the public income of those places, where they are discharged; and in case any body else should have a right of appointing them, it would so far interfere with the authority of the civil government, and so there would be two different jurisdictions or magistracies in one city or place, which how dangerous it is, we need not use many arguments to shew, since all those Princes and States that have been engaged in the reformation of religion do appropriate the same right to themselves." It is added, that they have copied after Geneva, "so that in a manner we agree with each other." (Brandt, v. 1, p. 322.) It is further said, and this shews how little the invitation to the people, to object when a minister approved of by the magistrate and the Church was proposed to them, was valued or acted upon, even at Geneva, that this practice had been discontinued in the Church of Geneva for some years, but that the ministers in 1560 had petitioned the magistrates that it might be re-established, which was done. (P. 323.) When the famous Synod of Dort was authorized by the States to assemble in 1618, it was expressly on the condition that they were to treat solely on the points of doctrine in dispute with the Arminians, and that "the right of patronage, both public and private, be preserved without encroachments." (Brandt, v. 3, p. 12.)

Thus, then, in every Protestant Church, so far as I am acquaint-

ed with their history, the people have not had the choice of their pastors ; and I know of but one exception to this, not however in a national Reformed Church, but in a small district of one. Even this was not the fruit of the Reformation, but arose out of a privilege in times prior to the Reformation. In certain counties in East Friesland, the people anciently had acquired the patronage of the benefices in the open country ; but this right had been surrendered to the Duke of Saxony by a treaty in 1498. It was restored to them by the Emperor Charles V., by a diploma or charter in 1539, expressly saving the *jus patronatus* belonging to private persons, and also reserving to himself the right of nominating, *honoris causâ*, to the first church in each of the three districts which should become vacant each year. The diploma is a very curious document, pointing out with great minuteness the parties by whom, and the mode in which, the election is to be made. After all, the person elected must be approved of by the senate. (Brandt, v. 4, p. 386. Gerdes, v. 3, p. 140.)

This uniformity in the views of the Reformers on the Continent in giving effect to the ancient rights of patrons, was founded on the most just and reasonable grounds. They did not establish a new Church ; for they had much more correct views of the nature of the Church of Christ, of which they were members. They merely reformed its corruptions, and freed it from the innovations and superstitions introduced by the Bishop of Rome, and brought it back to what they esteemed its apostolic model. They departed only from the communion of its errors ; from the communion of the church they professed not to have departed. On this they grounded their right to the patrimony, the tithes, and the ecclesiastical buildings which the church in former times had appropriated or erected, and which had been confirmed to her by the piety of former ages ; and as they succeeded generally in this claim, since they did not hold the opinion that the right of choosing their pastors belonged to the people *jure divino* (an opinion which in this country at least was not taken up till a late period, first, I think in 1647, Peterkin, v. 2, p. 143), they most naturally felt that they were bound to take the property of the Church, under the burdens with which it had been made over to the Church. The right of patronage had been secured to those who built or endowed a church ; and so effectual had this been, aided by the piety or superstition of founders, that churches were built and endowed fully adequate in Popish times to the demands of the population, so that there was no occasion in any country in Christendom to make a law enforcing the building of churches. There is no enactment to that effect in the canon law ; and no law for building churches exists to this day either in England or Scotland, though there be laws for repairing and rebuild-

ing them with us as early as the ecclesiastical code 1242, and renewed by 1563, c. 76. Could the Reformers decently take possession of the churches and houses of the Popish ecclesiastics, their tithes, and other property, and yet reject the conditions on which these were first granted to the church?

Now, the preceding historical detail will be found to throw considerable light on the views and practices of our own Reformers. For it is well known that a great intercourse was kept up among the Reformers in different countries; they entered into bonds and leagues to enable them to resist the powerful enemies to whom they were opposed, and great anxiety was shewn that as much as possible there might be unity of doctrine and discipline among them, as tending to strengthen the tie of interest which bound them to each other. Accordingly, rumours of the violence and the length to which the Reformation was carried in this country, having reached the Continent, "the churches of Geneva, Berne, and Basle, with other Reformed Churches of Germany and France, sent to the whole Church of Scotland the sum of the confession of their faith, desiring to know if they agreed in uniformity of doctrine. It was answered, that they agreed in all points except as to keeping some festival days." (Knox's History, v. 2, p. 188.) This was in 1566, and as a proof of this agreement, they subscribed this foreign confession, which is now known as the Latter Confession of Helvetia. (Keith, p. 568.)

With regard to the external polity of the Church, these foreign Reformers would find a singular uniformity with their own Churches. They saw in this Church superintendents and the right of patronage admitted, with power to the people of objecting if any impediment existed to the admission of the minister appointed for them. Our reformers did not think, and they so declared in the Confession of Faith 1560, "that ane policie and ane ordour of ceremonies can be appointit for all agis, tymis, and placis," so the polity of the Church might be the subject of arrangement with the State; and upon this principle they acted.

The Parliament, or rather Convention, which met in August 1560, established the Protestant religion in this country, and ratified the Confession of Faith drawn up by the reformers, abolishing the jurisdiction of the Pope and the Romish Church in this country.

What is termed the first General Assembly of the Protestant Church met on 20th December 1560, consisting of forty-four members, nine of these being designed ministers. (Keith, p. 499.) By this Assembly, eight ministers were appointed to particular towns, and five superintendents were chosen: "With this small number was the plantation of the Church at first undertaken." (Spottis-

wood, p. 149.) Immediately after the Parliament was dissolved, the First Book of Discipline was drawn up by Knox, Wynram, Spottiswood, Douglas, and Row (Calderwood, p. 24), "the same" "who had done the heads of doctrine,"* and presented to the council in December thereafter. It is sometimes said that the First Book of Discipline was hastily drawn up; that it and some of its provisions were only to be temporary, alluding especially to Superintendents; and that it was only to subsist till the Church was ripe for a better policy. No one can read this work and think it a hasty performance. It was the work of the same eminent men who drew up the Confession of Faith 1560 in four days, so fully prepared were they for their task; while the Book of Discipline, surely a much easier duty, was the fruit of some months' labour. Neither will any one discover in this work the slightest indications that the polity was intended to be temporary. Although this book was never approved of, either by the Church or the State, it may be noticed, as shewing the opinions of our Reformers on various points of Church policy, and particularly as to the election of ministers. It is there said (chap. iv. § 1 and 2), "Ordinary vocation consisteth in election, examination, and admission. It appertaineth to the people, and to every several congregation, to elect their minister." This, however, was not much more than a shew of giving them the election, for, "if they neglect this for forty days, the Superintendent, with his council, may present unto them" one to be their minister. After being examined, as well in life and manners as in doctrine and knowledge, he is to preach before the people where he is to minister, and if they can reprehend nothing in his life, doctrine, nor utterance (§ 4), "then we judge the church which was destitute unreasonable, if they refuse him whom the Church did offer, and that they should be compelled by the censure of the Council and Church to receive the person appointed," unless they had previously presented one better, or as well qualified, who is to be preferred; "for altogether this is to be avoided, that any man be violently intruded or thrust in upon any congregation; but this libertie, with all care, must be reserved to every several church, to have their votes and suffrages in election of their ministers. But violent intrusion we call not, when the council of the Church, in the fear of God, and for the salvation of the people, offereth unto them a sufficient man to instruct them, whom they shall not be forced to admit before just examination, as before is said." Not a syllable is said as to patronage; nor can it be discovered, from any part of

* Randolph says this treatise was submitted to the revisal of Lethington and Wynram, who mitigated the austerity of many words and sentences.—Tytler, V. vi. p. 213.

the First Book of Discipline, whether it was originally the intention of Knox and his coadjutors to recognise patronage, except when exercised by the Church, or not ; but I incline to think it was not intended to be recognised ; and that, while the nomination of a minister by the Church would not be violent intrusion, a presentation by a patron would be reckoned such in opposition to an election by the people.

In the unformed state of the Protestant congregations, and with the few ministers for the charge, it was natural for the Church to assume the privilege of appointing them to the duties and places where they would be most useful. Accordingly, in the first Assembly they did so. (Book of the Universal Kirk, p. 3 ; Calderwood, p. 29.) Some were appointed to be Superintendents, and some to be Ministers of chief towns. Again, in 1562, two persons are ordained to serve in such kirks as the Assembly shall appoint in their next session, and Mr Craig was ordained by the Assembly to be joined with Mr Knox in the ministry of Edinburgh, (Book of Universal Kirk, p. 17) ; and in the next session it was concluded, that one of the above should serve in the kirk which the Superintendent of Lothian should appoint. (Book of Universal Kirk, p. 18.) The nomination or election in these cases lay obviously with the Church, and assent was all that was required from the people. For this question was discussed in the eleventh General Assembly, 1565, " If sick as hes once enterit in the ministrie, been *appointit* be the superintendent, and *received* of the people, may leave their vocation and follow the world, because they cannot have a sufficient stipend," (Keith, p. 553) ; and the Church finally wished the practice to be sanctioned by the State, for, among certain articles proposed in 1574 to Regent Morton for adoption, is this one : " That in all churches destitute of ministers, such persons may be planted as the bishops, superintendents, and commissioners *shall name*, and that stipends be assigned to them." (Petrie, p. 384.)

The First Book of Discipline introduced Superintendents, and assigned dioceses to them, the whole of Scotland being portioned out into ten dioceses ; and Knox says in his History (v. 1, p. 260), " Superintendents and overseers were nominated, that all things in the Church might be carried with order, and well." They were at first to be named by the Privy Council, (ch. vi. § 6), " but after three years, the ministers, elders, and deacons of the town, with the magistrates and council, are, within twenty days, to nominate two or three ministers, one of which is to be elected with public consent. An edict is sent forth, warning all that have any exception against them to appear. The persons nominated are then examined, and the ministers of the province, and those of their congregations who convене, give their votes : if

“ any thing has been objected, the superintendent and ministers
 “ must consider whether the objection be made of conscience or
 “ malice, and they must answer accordingly. Other ceremonies
 “ than sharp examination, approbation of the ministers and super-
 “ intendants, with the public consent of the elders and people, we
 “ cannot allow.” “ The form for electing a superintendent and all
 “ other ministers,” printed along with the book of Psalms used by
 the Church, and in Knox’s History (B. iii. p. 402), was drawn up
 by Knox, and used by him in the inauguration of Spottiswood,
 as Superintendent of Lothian, on 9th March 1560–1. It corres-
 ponds with the above, and shews that, as in that instance, where
 only one person was offered to the congregation, the election was
 confined to their receiving him, if, as invited by the edict, none
 “ knew of any crime or offence that might unfit him to be called
 “ to that office,” and they were to state the objection, in such form
 as to enable the superintendent and ministers to consider if it was
 made of conscience or malice. Pardovan says (B. i. t. i. § 29),
 that this was the form of electing and ordaining ministers observed
 at the beginning of our Reformation. The intention may have
 been to give a list of two or three persons to the people, selected
 by the Church as fit for the ministry. But this certainly never
 was established.

We have the form of the edict inviting the people to state ob-
 jections, in the appointment of Wynram as Superintendent of Fife.
 It is dated so early as 20th March 1560–1, and is issued by the
 minister and elders of St Andrews, and bears (App. to Evidence on
 Patronage, 1834, p. 473), that the Lords of the Secret Council have
 directed him to be proponed to be elected superintendent, and requiring
 all to whom vote appertains in the election of “ sic chief ministers,”
 to appear “ and assist the said election, and be their votes to consent
 “ to the same, or ellis to oppone agains the lyff and doctrine of the
 “ person nominated ; and likeways we requir and charge the said
 “ Jhon Wynram to be personallie present the same daye, to ac-
 “ cept the charge quharwith the Kyrk sall burdyn him, with cer-
 “ tification to all and sundry, that seing, without the cayr of super-
 “ intendentis, neyther can the Kyrk be suddenlie erected, neyther
 “ can they be reteined in discipline and unite of doctrine ; and
 “ farther, seeing that of Crist Jesus and of his Apostles we have
 “ command and exempill to appoynt men to sic charges ; and
 “ now last, that we have command of the upper poweris to put
 “ the same to executione, we intend to proceed in the said election
 “ according to the ordour in the Booke of Reformatione.”

The terms of this edict distinctly shew that the people were to
 consent, unless they could oppone any thing to the life and doc-
 trine of the person nominated.

It appears that the Church, having assumed the nomination

of the ordinary ministers, wished to appropriate the election of Superintendents also, to the effect of giving a leet of two, out of which one was to be chosen by the province. Thus, in the 5th General Assembly 1562, on complaints that superintendents had not been appointed for Aberdeen, Banff, Jedburgh, and Dumfries, (Keith, p. 518), the Assembly gave a leet of two ministers for each place, and appointed their election and inauguration to take place on certain days named, and various ministers are appointed specially to churches by this Assembly. The nomination of the Superintendents seems to have been considered an encroachment on the power of the Crown, which formerly had the appointment of bishops; and, at all events, the three years were not expired during which it was secured to the Privy-Council. Accordingly, in the fifth session is this entry: "Notwithstanding of the nomination of Superintendents for Aberdeen, Banff, Jedburgh, and Dumfries, made before in the third session, the Assembly remitted further advisement and nomination of the persons to the Lords of the Secret Council, providing the days for the admission be not altered." (Keith, p. 519.) But notwithstanding the anxiety of the Church to have these "chief ministers" appointed, the Privy Council did not respond to the call, probably from some difficulty as to their salary; for this was one material distinction between the ordinary ministers and the superintendents, that, while the former were divided into three classes, and had the miserable stipends of 100, 200, or 300 merks assigned to them, the superintendents had salaries of about five times the amount. (Keith's Appendix, No. XII.; Cooke's History, v. 3, p. 48.) Thus, the Superintendent of Angus had a stipend of fifteen chalders of grain; and the only exception was Knox, who, though only a minister, had twelve chalders and 600 merks yearly, which, on his death in 1572, was continued for one year to his widow and three daughters. (Cooke's History of the Church, v. 1, p. 229.)

The General Assembly, however, still continued to urge the appointment of superintendents, where none are within this realm, and to claim the nomination of them. In the 9th Assembly, December 1564, it was ordained, "That the persons who were nominat for election to the superintendentship of Aberdeen, December 1562, sould now again be put in leets: that edicts be served, and the person chosen be inaugurat at Aberdeen the 2d Sunday of March next, by the superintendents of Angus and Fife, with such ministers as they sould choose for such inauguration." (Keith, p. 537.) And in the conferences which took place on Regent Murray's accession to power, for duly authorizing the Reformed Faith, one of the articles proposed is, "That Superintendents be appointit quhair neid requiris, and that ordoure be providit how thai salbe obeyit in thair offices, and

“how thai salbe hable to serve in the same.” (Thomson’s Acts, 1567, vol. 3, p. 37.) Farther, by the General Assembly 1568, it is resolved, “To advise with my Lord Regent his Grace and ‘Council, that in Rowms and Contries where are no Superintendents, they may be placed.” (Petrie, p. 360.) The plan, however which Morton devised for introducing bishops, prevented any further appointments of superintendents beyond the original five.

Erskine of Dun, the superintendent of Angus, on one occasion asserted, and asserted most truly, that the office of superintendent and bishop were the same. When Morton in 1572 introduced the name rather than the order of bishops, and when the superintendents sought their wonted allowances from him, he insulted them by saying there was now no occasion for them, as bishops were restored. (Spottiswood, p. 272.) On this Erskine, Spottiswood, and Wynram, the three survivors of the superintendents, came to the General Assembly when it met in March 1574, and desired to demit their office, and were earnest that the Kirk should accept their demission, as they were now counted useless ecclesiastical officers. (Cooke, vol. 1, p. 327.) But the Assembly declined to do this, and renewed the declaration, that bishops and superintendents stood on the same level; that the jurisdiction of bishops did not exceed that of superintendents; that no bishop should within his diocese, give *collation* of any benefice within the bounds of superintendents. And an article is sent to the Regent, That stipends be granted to superintendents *in all time coming* (for it is a mistake to say the office was intended to be temporary) in all countries destitute thereof.

All these proceedings are of course omitted by Calderwood. They are a good deal curtailed by Petrie. I take them from the Register of the Proceedings of the General Assembly.

It is recorded among the proceedings of the first Assembly in 1560, that “Mr John Ramsay was presented be Sir John Borthwick, as minister for the kirk of Aberdour and Tyrie.” (Book of Universal Kirk, p. 5.) It was already noticed that patronage is not once mentioned in the First Book of Discipline, and it probably was not intended to admit it, as being hostile to the views of the Church. Accordingly, although the above entry is in the minutes, it is not said that the presentation was sustained, or that Ramsay was admitted to his trials, or that any thing followed upon it. And at the session a few days afterwards, Dec. 27. 1560, the election of ministers is spoken of as being in the people, in accordance with the views of the Book of Discipline. But this presentation probably led the way to the admission of Lay Patronage; for considering who the Patron was who claimed his ancient right, the Assembly must have been loath to

refuse him any privilege he would have enjoyed in Popish times. He had suffered in the cause of the Reformation. Being an officer in the Scots Guards in Paris, Sir John Borthwick had imbibed the principles of the Reformed Faith; and having come to Scotland, bringing with him certain works of Luther and *Æcolampadius*, and having freely discussed the subjects of controversy between the Protestants and the Church of Rome, he was in 1540 summoned to appear before Cardinal Beaton and his assessors at St Andrews. Having wisely failed to appear, Borthwick was in absence condemned as a heretic, and burnt in effigy. (Foxe's *Martyrs*, p. 606. Keith, *Appendix*, p. 6.) He withdrew to England, and was employed by Henry VIII. to negociate an alliance with the Protestant States of Germany. He had returned to Scotland on the fall of the Papal Church there, and in 1560 gave in this presentation to the General Assembly. The sentence of heresy still stood against him; and, accordingly, he obtained a warrant from the Privy Council, dated 12th August 1561, directed to the Superintendent and ministrie of St Andrew's for cognition of his former sentence. It is reversed by Wynram, the Superintendent of Fife, "with the counsail, judgement, and consent of venerable and godlie learnit men, to wit, Mr Jhon Douglas," &c.; and we may notice that Wynram designs himself by the prelatic term *WE* in the plural, in the same manner as the Cardinal had done in the original sentence, the only difference being that the Popish prelate's sentence is pronounced in Latin, while the Reformed prelate's is in English. (Bannatyne *Miscellany*, vol. 1, p. 253.) It is worthy of remark that Wynram, as subprior of St Andrew's, was one of the cardinal's assessors in 1540, and that being the judge who, in 1561, reversed the sentence, he declares that it had been pronounced by "plain enemies of the truth."

A presentation from such a martyr to the true Faith, could not fail to be attended to, especially as it was probably found that such claims would be insisted on. Accordingly Ramsay is found in 1563 minister of Aberdour and Tyrie in Aberdeenshire. (*Register of Ministers, Exhorters, and Readers, and of their Stipends*, printed at Edinburgh, 1830.)

It would appear that the deputation from the Church, who went to the Queen at Perth, and followed her to Dunkeld in 1565, with the articles from the General Assembly, led her to fear that they wished to interfere with the Church Patronage of the Crown; for she says in her answer (Keith, p. 560), "That her Majesty thinks "it na ways reasonable that she should defraud herself of so great "a part of the patrimony of her crown as to put the patronage of "benefices furth of her own hands;" and this brings forth the memorable reply as to patronage by the Assembly, which John Row

was appointed to draw up, and which was well considered by the Assembly before being sent to the Queen. "Our mind is not that her Majesty, or any other patron of this realm, should be defrauded of their just patronages." They thus reckoned it a fraud against patrons to deprive them of this right. "But we mean," they add, "whenever her Majesty, or any other patron of this realm, does present to a benefice, that the person presented should be tried and examined by the judgment of learned men of the Kirk, sike as are presentlie the Superintendents, appointed thereto. And as the presentation of benefices pertaines to the patron, so ought the collation thereof, by law and reason, pertain to the kirk; of the whilk collation the kirk should not be defrauded, more nor patrons of their presentation." (Keith, p. 551.) The Queen's answer and reply by the Church were reckoned so important and fundamental, that they were ordered to be recorded in the Buik of the Universal Kirk. (Peterkin, v. 2. p. 17.) This placed the matter on its proper footing in accordance with the rule of other Reformed Churches, and removed the evil complained of at the time, that persons who were not even ministers, still less capable of teaching the Reformed Faith, were put into benefices, not having been subjected to the examination of the Church.

In 1567, the acts 1560 were renewed, and it was enforced by c. 7, "that the examination and admission of ministers be only in the power of the kirk now openlie and publiclie professed within the realm," in contradistinction of the Popish Church, giving the Reformed Church the same power in this matter which its predecessor had had; and of course as it follows, "the presentation of laick patronages always reserved to the just and antient patrons." I may notice in passing, that the finality of the judgment of the General Assembly, mentioned in the close of this act, can, in my opinion, apply only to the immediate subject of the enactment—the qualifications of the person presented—where the patron has presented a person qualified to his understanding, and the Church is to try if he be really qualified. That such persons should be tried by the examination of the superintendent had been expressly provided by the First Book of Discipline, and by various acts of Assembly before this time, (Petrie, p. 233; Spottiswood, p. 157 and 190)—and the examination is now secured to the Protestant Church by this enactment of the state: further, it was agreed that this examination should be final by the Church, though the patron was not bound to rest satisfied with the opinion of the superintendent alone, for the Civil Court did not wish to interfere as to the trial of the presentee's qualifications. Therefore as to these the patron must rest satisfied with the judgment of the highest Ecclesiastical Court. This is the law which was then, and still is, observed in England as to this matter. (Blackstone, v. 1, p. 390.)

But it is quite different if the superintendent, or presbytery now, should refuse altogether to inquire into the qualifications of the presentee. It is impossible to hold that the patron, in such a case, is bound either to apply to a superior Church Court, or to be satisfied with its decision as final. The presbytery are bound to receive him to his trials. Truly it cannot be supposed that the very act which expressly reserved the rights of lay patrons, conferring on the Church at the same time the distinct power of examination and admission, should be intended to give the superintendent the power of refusing to examine and to reject a presentation, except on the ground that the presentee was not found qualified upon examination. That the Church Courts alone were to be the judges of other grounds on which they might refuse to admit the presentee, than want of the qualification which it was within their province to try, seems utterly inconsistent with the reasonable meaning of the Legislature or of the Church at the time.

The First Book of Discipline had been sanctioned neither by the Church nor the State, and various committees were appointed almost every year by the General Assembly for drawing up a form of policy, and similar Commissioners were appointed by Parliament. (Cooke, v. 3, p. 101; Calderwood, p. 47, 52, 56, 57, 65, 67, &c.; Acts of Parliament, v. 3. p. 89, 105, 137, 303, &c.) In the course of doing so, certain heads in 1571 were proposed as a basis, but they state nothing against patronage, nor claim any right in the people to elect.

I was surprised to hear it gravely asserted, that the Presbyterian form of religion was sanctioned in 1560. The Protestant faith was then established, and although we were to adopt as correct the language of Parliament at the Revolution, that the country reformed from Popery by presbyters, it would not be true that the Presbyterian Church government had then been introduced. Even as yet Presbytery was not; there was no Church court on the principle of parity among its members—that is, consisting of presbyters alone. The first and lowest was the Kirk-session, consisting of the pastor, and elders “that labour not in word or doctrine.” This court claimed very high powers in some instances at least; for Archbishop Hamilton writes thus to the Archbishop of Glasgow in Paris, 18th Aug. 1560 (Keith, p. 487), “Farder the elderis callit of every town takis all causis of our ecclesiastical jurisdiction and intromettis with all our office;” and well he might say so, for the register of St Andrew’s shews that Knox, while minister there, and afterwards Goodman, who succeeded him when he was removed to Edinburgh, entertained actions of divorce; and what is singular, the summons always contains a provision that, on obtaining the divorce, the party shall be allowed to enter into a second marriage. This was not the doctrine of the Popish Church; and for this

change in the ecclesiastical law of this country, I know of no other authority than the practice of the Reformed Church, commencing in the lowest court of ecclesiastical jurisdiction. A decree of divorce by the ministers, elders, and deacons of Edinburgh, on 25th July 1560, is mentioned by Mr Ferguson. (Reports of Actions of Divorce, p. 425.) This power of divorce, assumed by the lowest ecclesiastical court, was checked by the Assembly, 25th December 1562, ordaining "That no minister, nor others bearing office in the Kirk, take in hand to cognosce or decide in any action of divorcement, except the Superintendents, and they to whom they shall give special commission." (Keith, p. 519.) There is a singular instance of the exercise of this jurisdiction by the Superintendent of Fife, in a process of divorce upon the same shameless plea which, a few years afterwards, was urged in this country by the profligate Countess of March, and in England by the Countess of Essex. (Sir Walter Scott's History of Scotland, vol. 2., p. 176.) The process before Wynram, and the language in which it is carried on, are in all respects suited to the rudeness of the times. This power of the superintendent deciding in actions of divorce ceased on the appointment of the Commissary Court of Edinburgh, 1563.

"If any person find himself hurt by any sentence given by any minister, elders, and deacons, it shall be lawful for the person so hurt to appeal to the Superintendent of the diocese and his synodal convention, within ten days." (Assembly, June 1563—Calderwood, p. 33.) This was the next highest court.

"If the party yet allege himself wronged, it shall be lawful to appeal to the General Assembly following." (Ibid.) These were all the Church courts then known.

It was argued as a proof of the legislative powers of the Church, that there is no statute which defines the constitution of the General Assembly. This is not to be wondered at, considering the manner in which the Reformation was effected in this country; it was brought about by the sword of the Congregation, in opposition to the authority and arms of the Crown. But the act 1567, c. 6, which declares the Reformed to be the only true and halie kirk, and designates this as Christ's bodie, and the following act which recognises the judicatories of the Kirk, the superintendent, the superintendent and ministers of his province, and *the General Assembly of the haill realme*, as having jurisdiction in the examination of presentees, in fact confirm the constitution of the Church and General Assembly which the Reformers had adopted. Further, the various acts (1571, c. 35—1578, c. 6.), on the appointment of the successive Regents, which ratify "the freedom and liberty of the true Kirk of God and religion now publicly professed with-

“ in this realm,” sanction and confirm the constitution of the General Assembly. Under the circumstances of our Reformation this is as much as could have been expected, or was at all necessary. As planned by Knox and his coadjutors, its constitution was this.

At first the clerical members were the superintendents and such ministers (by act of Assembly, June 1562, see also Lord Glamis's letter to Beza in 1576) as they should select. Afterwards, when the Church was further organized, it was enacted in 1568, “ that
 “ none should have voice in these Assemblies but superinten-
 “ dents, visitors of churches (who were temporary superinten-
 “ dents), commissioners of shires and universities, and such mi-
 “ nisters as the superintendents should choose in their diocesan
 “ synods, and bring with them, being men of knowledge, and
 “ able to reason and judge of matters that should happen to be
 “ proponed.” (Spottiswood, p. 219.) The effect of this would be, that, as superintendents were appointed on the recommendation of the Privy Council, they would be well affected to the State, which afforded protection to their Church; and being men of talent and of high authority in the Church, their influence with the inferior clergy would be sufficient to secure the nomination of those members of their diocese, who possessed the largest portion of the required qualifications. The permanent membership of these superior officers must have given them weight and influence in the Assembly. The transference of this power of nomination to the Presbytery, which took place afterwards, and the parity in the Church, has given of course a very popular tone to the deliberations of the General Assembly.

In 1572, the Regent Mar said he would “ procure reforming
 “ of things disordered in all sorts, the privilege of the crown, king
 “ and patronages being preserved.” (Cald. p. 49.) In 1576, a committee of the Church was appointed as to the power to be given to visitors of the kirks, who were temporary superintendents. (Cald. p. 71.) The advice of the committee, among other matters, was, “ upon the presentations of patrons to the visitor, he, with con-
 “ sent of the Synodal Assembly of his province, shall give letters
 “ testimonial to him that is presented, lawful impediments being
 “ taken away * * providing always that the consent of the flock
 “ where he shall be appointed be had, or else a reasonable
 “ excuse shewed wherefore not.” Presentations were universally acknowledged. A refusal by the people to consent, without shewing a reasonable cause, was never dreamt of, and consent was understood to be given if none such could be substantiated.

At last, under the auspices of Melville, the Second Book of Discipline is framed. A full account is given by Calderwood

(p. 73, 75, 76, 79, 81) of the progress of the Commission of the General Assembly during 1576, 1577, and 1578, with the names of the Commissioners, and the part which each took in the composition and revision of this important work. The Church being now recognised by the State, and seeking the benefit of this recognition in the provision to be made for its ministers, never contemplated the possibility of establishing the policy nor jurisdiction of the Kirk, independent and without the sanction of Parliament. From the very earliest date of the recognition of the Church, they "in certain articles concerning the affairs of the Kirk" applied to Parliament "anent the jurisdiction justlie appertaining to the trew Kirk," and accordingly (Thomson's Acts, v. 3, p. 24), "the King's grace, with avise of my Lord Regent and thre Estatis of this present Parliament, hes declarit and grantit jurisdiction to the said Kirk, * * * and declaris that thair be na uther face of a Kirk, nor uther face of Religioun, than is presentlie be the favour of God establisheit within this Realme. And that thair be na uther jurisdiction ecclesiasticull acknowlegeit within this Realme uther than that quhilk is and salbe within the same Kirk, or that quhilk flowis theirfra concerning the premissis;" and then commission is granted to certain of the laity and clergy "to seirche furth mair speciallie, and to consider quhat uther special pointis or clausis sould apperteine to the jurisdiction, privilege, and authoritie of the said Kirk, and to declair their myndis thairanentis, to my Lord Regent and thre estates of this realme at the next parliament. Swa that thai may tak ordour thairintill, and authoreis the samen be act of parliament, as salbe fund agreeabill to the word of God." I know of no act upon this matter till the act 1592. So that it is ridiculous to speak of legislative powers in the Church, or jurisdiction validly exercised independent of the sanction of the State, except in matters purely spiritual, and as distinguished from what may be termed ecclesiastical. It is only if the records of the time are overlooked that such vague assertions will be hazarded. No such power was so much as claimed at that period.

Accordingly, when the Church had completed, according to their views, the Buik of the Policie of the Kirk, they presented it to the King and Three Estates of Parliament, and "maist earnestlie desirit the samyn and haill constitutionis and ordinanceis thairin contentit to be confirmit be act of parliament, and have the strenth of ane law perpetuallie in tyme cumming." (Thomson's Acts, 1578, c. 19, v. 3, p. 105.) Commission is accordingly granted to certain persons of each estate and six of the ministry to confer upon it. Erskine of Dun is selected as one for the order of Barons. As to the proceedings of this committee, we are informed "that such general heads as did not touch the authority of the

“ King, nor prejudice the liberty of the estate, were easily agreed. The rest were passed over or deferred to further reasoning, which could not after be obtained of the council, one excuse or other being still pretended. The ministers perceiving they would not speed this way, did in their next Assembly resolve to put their conclusions to practice without insisting any more for ratification thereof.” (Spottiswood, p. 302.) But of course this could only be in matters within their own power. Even if the articles as to patronage had been agreed to by the commissioners, this would not have been sufficient, till ratified by Parliament. But they were not agreed to, and the Assembly, on their own authority, could not affect this civil right. Instead of the Church continuing to crave that patronage should be surrendered to them, we find that they acquiesced in the continuance of patronage as the price they paid for the privileges they obtained by the adoption and consequent endowment by the State.

In this book a most material change is introduced as to the election of ministers, and the mode prescribed in it much more accurately corresponded with the practice which had prevailed in the Church, than that contemplated by the First Book of Discipline, but which apparently had never been carried into effect. For it bears, “ The ordinary and outward calling hath two parts, election and ordination. Election is the choosing out of a person or persons, most able, to the office that vaiks, *by the judgment of the eldership and consent of the congregation* to which the person or persons shall be appointed;” * and it further bears, “ In the order of election it is to be eschewed that no person be intruded in any office of the Kirk contrary to the will of the congregation to which they are appointed, or without the voice of the eldership” † *i.e.* the presbytery, and imposition of hands of the eldership is now required in ordination. Thus the commissioners were willing to agree to the non-intrusion principle, but not at all according to the views of the Church; they would not leave the choice with the Presbytery.

In the chapter of special heads to be reformed is this article: “ The liberty of electing persons to ecclesiastical functions observed without interruption, so long as the Church was not corrupted by Antichrist, we desire to see restored and retained within this realm; so as none be intruded upon any congregation, either by the prince or any other inferior person, *without lawful election and the assent of the people* over whom the person is placed, according to the practice of the apostolick and primitive Church.” ‡ The lawful election is, of course, election by the el-

* This by the Commission appointed by Parliament is referred. Spottiswood, p. 292.

† This is agreed to, p. 292.

‡ By the Commission, agreed to in general.—Spottiswood, p. 301.

dership, as noticed before ; and this, with the *assent* of the people, as contradistinguished from the *election*, is required to be restored, and then there will be no intrusion of a minister on the congregation. Where there was no lay patronage, this was then the mode of election ; the General Assembly transferring the power formerly exercised by themselves in such cases, to Presbyteries ; and the Church plainly contemplated the abolition of lay patronage, that the election as to all churches might be in their hands, the assent of the congregation being given, either by express or silent acquiescence, if they could not object any thing specially against the person elected, as invited to do by the edict before ordination. For it is immediately added, “ And because this order cannot stand with patronages and presentation of benefices used in the Pope’s church, we desire all those that truly fear God to consider, that patronages and benefices have no ground in the word of God, but is contrary to the same, and to the liberty of the election of pastors, and ought not now to have place in the light of reformation. And, therefore, whosoever will embrace the light of God’s word, and desires the kingdom of his Son, Jesus Christ, to be advanced, would also embrace and receive the policy which the word of God craves, otherwise it is in vain that they have professed the same.”* It is well known, that this earnest appeal to the lay professors of the Reformed Faith was not responded to ; patronage was not surrendered by them : and, therefore, since it is said, and is true, that election by the Presbytery could not stand with patronage ; if there was intrusion of a pastor when the election by the Presbytery did not take place ; since patronage was not abolished, this fundamental law, as a rule of practice and guide of conduct, could not take effect. This, too, is very clear, that when the Church declared, that no minister be intruded without the consent of the congregation, it was held to be quite compatible with the choice of the minister being with the Church and not with the people, though they had no right to dissent but on special grounds to be judged of by the Church ; and when the Commissioners of Parliament agreed to this declaration, it was under this notion, that it was not inconsistent with the nomination being in the patron instead of the church.

The claim to the patronage of all the churches was not the only extravagant claim made by the Church in the Second Book of Discipline, for a claim is also made to the entire patrimony of the Church ; by which “ we understand, whatsoever thing hath been at any time before, or shall be hereafter given, or by universal consent or custom of countries professing the Christian religion, applied to the public use or utility of the Church. So that, un-

* This was not agreed to by the Commission, but referred.—Spottiswood, p. 301.

“ der the patrimony of the Church, we comprehend all things
 “ given or to be given to the church and service of God,—as lands,
 “ buildings, possessions, annualrents, and the like, wherewith the
 “ Church is endowed. We comprehend also all such things as,
 “ by laws, custom, or use, of countries, hath been applied to use
 “ and utility of the Church : of which sort are tithes, manses, giebes,
 “ and the like. To take any part of this patrimony by unlawful
 “ means, and convert to the particular and prophane use of any
 “ person, we hold a detestible sacrilege before God.” (Spottis-
 wood, p. 297.) With regard to “ the rents and patrimony of the
 “ Church,” this scheme of Policy declares, “ not only the minis-
 “ ters, but also the poor and schools, must be sustained upon the
 “ tithes. The tithes that we think must be lifted for the use of
 “ the Church are, the tithes of hay, hemp, lint, cheese, fish, calf,
 “ veal, lamb, wool, and all sorts of corn. But because these will
 “ not suffice to discharge the necessities of the Church, we think
 “ that all things dotate to hospitality in times past, with all an-
 “ nualrents both to burgh and land, pertaining to priests, &c. (in-
 “ cluding all monastic institutions) be retained to the use of the
 “ Church : likways the whole revenues of the temporalities of bi-
 “ shops, deans, and archdeacons, with all rents of lands pertaining
 “ to cathedral churches, which must be applied to the entertain-
 “ ment of superintendents and universities.” Does it appear from
 this that it was the intention of our Reformers to make Superinten-
 dents more temporary than universities, schools, or other ministers ?
 If these claims had been successful ; if the reformers had succeeded
 to all the wealth and more than the power of their Popish prede-
 cessors, who shared patronage with the Crown and lay patrons, the
 purity of their faith would scarcely have compensated for the ec-
 clesiastical tyranny which no doubt would have resulted from the
 transference into their hands of such influence. The proceedings
 of the Church in the subsequent century will scarcely enable us to
 conjecture what would have followed if their claims had not been
 resisted by those lay professors of the faith, who, seizing on the
 Church property, were willing to allow Knox to redress the spi-
 ritual concerns of the Church, if they were allowed to reform the
 temporalities by taking them to themselves. However much we can-
 not but condemn the interested motives of these men, and lament
 the great excess of their cupidity, we must admit that this conduct
 checked a great evil which would have followed, if the claims of the
 Church had been acceded to, both as to patrimony and patronage.

It was in 1581 that presbyteries were first formed, and this was
 jointly by the State and the Church. Instructions were sent from
 the King, with advice of his Privy Council, to the General Assem-
 bly, in furtherance of various previous conferences (Calderwood,
 p. 97) to consider “ how elderships may be constituted of a cer-

“tain number of parishes lying together ;” and then a form drawn up by the Council for erecting the parish churches into Presbyteries and Synods, is submitted for consideration and approval of the Assembly.

The Assembly agreed to the measure, and that a beginning be had of Presbyteries instantly in certain important towns “to be “exemplars of the rest.” (Calderwood, p. 101.)

The Assembly also appoint an answer to his Majesty and Council, “that the Assembly praiseth God greatly for his Majesty’s “zealous and christian affection, in promoving of good order “within the kirk, with thanks to his Highness for the labours “which have been taken for the constitution of presbyteries, union “and division of kirks, wherein the Assemblie hath so far travail- “led, that certain presbyteries are by them erected.” Accordingly it is recorded, that the presbytery of Edinburgh was erected on the penult of May 1581. (Calderwood, p. 116.)

Thus, then, were Presbyteries introduced into the Church of Scotland, which gave their name to the form of polity afterwards established in 1592. Presbyteries and the Synods to which they belonged, were thus authorized jointly by the Church and the State: so that the presbytery is not the radical ecclesiastical court, nor is the Church built upon presbyteries. This polity was finally approved of by Parliament in 1592. How incorrect then is it to say, that the polity of the Church, with all its assemblies, presbyterial, synodal, and general, is not the creature of the Legislature, though approved of also by the Church. It was the effect of its recognition, and endowment, and protection, by the State, that made it necessary for the Church to go hand in hand with the State in the arrangement of its polity. The Church did not, at this period, assert the right of establishing her constitution of her own authority.

Patronage was, at this time, firmly claimed both by the King and other lay patrons. Accordingly, the legislature enacted, by 1581, c. 102, “That all benefices of cure under prelacies shall be presented by our Sovereign Lord and the laick patrons, in favour “of able and qualified ministers, apt and able to enter into that “function, and to discharge the duty thereof.” The General Assembly, in 1582, in certain articles presented to the King and Estates, crave “that the presentation of benefices be directed to the “presbyteries of the bounds where the benefice lyeth, that, by “them, after due trial, the qualified person may be admitted.” (Calderwood, p. 135.) For it had been complained of, that benefices are given to unworthy persons, intruded into the office of the ministry, without the Kirk’s admission, directly against the law of God and acts of Parliament. Imposition of hands not being required, rendered this irregularity more easy ; but it may be noticed,

that in the article thus presented for approval and enactment, it is implied, that nothing intervenes between the presentation and admission except the trial by the presbytery. Another of these articles was—"That no presentation be given to any man, with
 "a blank, therewith, for their filthie avarice, to go through
 "the country and make shameful merchandise, and search who
 "will offer most or receive least; but that such be chiefly regarded as by the presbyteries or universities shall be recommended to the King's Majesty or other laick patrons." (P. 135.) Certainly it was a most meritorious act on the part of the Church to endeavour to put an end to such simoniacal transactions, so destructive of the interests of religion; but the attempt to do so, is not by giving the election of ministers to the people, but by securing some control over the nomination to themselves or the universities.

In 1586, there was a conference, in which it was agreed that there should be Bishops—"That his election shall be by a presentation, directed by his Majesty to the General Assembly, of
 "whom he shall receive his admission. * * * Provided always
 "that the particular flocks, being forewarned, have place to oppose, as in the election of other ministers," (Calderwood, p. 197); thus shewing to what extent the people interfered in the election of a minister.

The act 1592, c. 116, which is the charter of presbytery, ratifies and approves the church government by kirk-sessions, presbyteries, &c.; but it does not sanction the Second Book of Discipline generally; nor, in particular, that part which regarded the election of ministers by the presbytery. It rejected this part—at least passed it by; and, on the contrary, patronage, which was inconsistent with it, was retained. Instead of sanctioning the views of the Church as to the election of ministers, it expressly ordains "*all presentations to benefices* to be direct to the particular presbyteries in all time coming, with full power to give collation thereupon; and to put order to all matters and causes ecclesiastical within their bounds, according to the discipline of the Kirk; providing the foresaid presbyteries be bound and astricted to receive and admit whatsoever *qualified* minister presented by his Majesty or laick patrons." Patronage was thus embodied in the original constitution of the presbyterian church in this country; and it will be observed, that still nothing is interposed between the presentation and the power of the presbytery to give collation.

This astricting clause, as it has been termed, was introduced obviously in consequence of the claims made by the Church as to the election of ministers, set forth in this Second Book of Discipline, part of which the State was expressly sanctioning, rejecting other parts of it, and, among these, the claims of the church in this mat-

ter ; and this was done with the express view of putting down these pretensions, which were so inconsistent with the rights of patrons. Still more clearly to shew that they were not to oppose a patron exercising his right by presenting a qualified person, this clause was introduced into the act. It was the condition on which the desire of the Church was acceded to, that presentations were now to be directed to presbyteries,—the first time this privilege had been conferred upon them ; and, therefore, it was impossible for the Church to reject the condition under which alone it was conferred. Moreover, if any doubt could remain, as to the refusal by the superintendent to admit being confined to the want of qualifications of the presentee on examination, in which case, by 1567, c. 7, the review of the church courts was to be final, it would be cleared up by this clause in this subsequent act, which expressly binds the Church to receive a qualified presentee. It is only one not qualified that they can refuse to admit.

Permit me here to advert to another observation which has been made on this clause. On episcopacy being established by 1612, c. 1, it is sometimes thought that a marked change was introduced, and that letters of horning are authorized, charging the Ordinary to do his duty in the receiving and admitting of the presentee of the patron if qualified, and that a power was given to the State to interfere with the privilege of the Church to receive and admit, and of course, ordain a presentee. But this is not the meaning of the act. It was well observed, that the act applies only to the case of “ a qualified minister, who hath been once received and admitted “ into the functions of the ministry, being then still undeprived ; ” and that it does not apply to a presentee, who comes for the first time for ordination to the Bishop, along with his presentation to the benefice. If it had been intended to grant a compulsitor against the Bishop, it never would have been confined to the few cases which could occur, of ministers transported from one church to another, or who had been previously admitted to the ministry, leaving out the numerous instances, in all future times, of presentations to those not yet ordained : a compulsitor would have been given to admit these also, if found duly qualified. The explanation of Mackenzie is not very satisfactory (*Observations*, p. 175) ; but there is an explanation which will account both for the act and the limitation of it ; for there was, in truth, no desire to interfere with the rights of the Church, now that it was modelled according to the King's wishes : the object was rather to exalt it, and free it from trouble. Now, it is well known that when Spottiswood and two other bishops elect went to London for consecration, in 1610, the excellent Bishop Andrews scrupled about the lawfulness of their ordination as priests, considering that their admission had been by presbyters only, and in a church which originally dis-

pensed with imposition of hands, as the French and Dutch churches, and some of the Protestant states of Germany, from the necessity of the case, had done. The difficulty, however, was got over; but, to prevent any such scruple occurring in Scotland on the transportation of a minister, and to avoid the mischievous effects of such an unpleasant discussion, by making his institution to his new benefice an act of obedience, this clause may have been introduced. There, of course, could be no occasion of applying it to a new ordination.

The astringing clause, it is true, was not renewed in 1690, when the act of 1592 was revived, because this was unnecessary. The long course of obedience to the law of patronage settled it as the law of the land, and the modification of it, by bestowing the nomination on the heritors and elders, giving compensation at the same time to the patron, provided fully for every reasonable interest, and left no room to doubt the obedience of the church courts. When patronage, however, was restored by the act of Queen Anne, it is expressly enacted, that the presbytery “is hereby *obliged* to receive and admit, in the same manner, such qualified person or minister as shall be presented by the respective patrons; as the persons or ministers presented, before the making of this act, ought to have been admitted.” This seems, in other words, just the astringing clause of 1592. When the State uses, and is entitled to use, the term *obliged*, it seems fully equivalent to *bound and astringed*; and as it uses the word person as well as minister, it leaves no room for the hypercritical remark, that it is only a minister, and not a presentee, who is a probationer, that the Church is obliged to admit. Accordingly, the Church have, as might have been expected, obeyed it as the law of the land, although they long and earnestly endeavoured to get it altered. Never till 1834 did they authorize their presbyteries to disobey it.

In the times of popery in this country, the patronage of the churches in burghs generally, as well as of many country churches, had belonged either to the bishop or to monastic institutions; more commonly to the latter. Thus, the abbacy of Dunfermline had the patronage, among other churches, of the parish churches of St Giles in Edinburgh, and of St John's in Perth. Monasteries being rooted out and abolished, the patronage was in abeyance, and the Reformed Church stepped in and provided ministers for these churches. This was natural in the early days of the Church, and well suited its views. Hence it was continued after congregations were formed; and by an act of the General Assembly, 1590 (Calderwood, p. 255), “Synods were ordained to provide pastors for burrow towns yet unprovided; Edinburgh, Dundee, and St Andrews, being excepted;” an exception afterwards taken away in 1597. (Calderwood, p. 410.) And such was

the power, and such the claims of the Church, at this time, that, in 1593, the King applied to the General Assembly for a leet of five or six of the discreetest of the ministry, that he may make choice of two of them to serve in his house. (Calderwood, p. 285.)

The nomination of ministers, especially in these principal and important towns, gave the Church great power and influence over the country; and it became the policy of King James to get this power out of their hands, which had been rather assumed than given to them. The proceedings adopted by him with this view in 1597, and the conduct and pretensions of the Church, afford a useful commentary for ascertaining the measure of power meant to be given by the Church to the people in choosing their minister, and what was implied in not intruding any without their consent. He first set forth certain queries, to be discussed in a convention of Estates and a General Assembly appointed to meet for this purpose. One of these was—"Is not the consent of the most part of the flock, and also of the patron, necessar in electing pastors?"

The synod of Fife, under the influence of the two Melvilles, met previously, and resolved on answers to the King's queries, with the view of these being adopted by the Church. The answer to the above is this—"The election of pastors should be made by those who are pastors and doctors lawfully called, and who can try the gifts necessarily belonging to pastors by the word of God; and to such as are so chosen, the flock and patron should give their consent and protection." (Js. Melvill's Diary, p. 258—Calderwood, p. 385.) Such were yet the claims of the Church, influenced as it was by the author of the Second Book of Discipline, and as they negative any thing but a blind assent of the congregation, their voice is out of the question in the choice of their pastors, who are to be elected by the presbyteries.

When the Assembly met, the King found himself obliged to modify some of the queries; and this one, instead of being general, was thus put—"That in all principal towns, ministers be not chosen without the consent of their own flocks, and of his Majesty, and *that* order to begin presently in the planting of Edinburgh." (Melvill, p. 268—Calderwood, p. 396.) A committee of the Brethren was appointed to draw up answers, and this was proposed as the answer: "This article is answered by an act of the General Assembly, which ordaineth that the principal towns be planted with ministers by advice of the General Assembly, at which his Highness' Commissioners are and should be present." (Calderwood, p. 397.) Still negativing any right in the people.

The King, however, had contrived to get so numerous an attendance of ministers from the north, that the Assembly modified the answers of their committee, and it finally stood thus:—

“ In all principal towns, ministers should not be chosen without consent of their own flock and his Majesty.” (Calderwood, p. 398.) Still the people were only to give their consent, in concurrence with the king; they were not to be the electors or have the choice of their ministers in those towns.

The moderator of the General Assembly, together with the hail ministrie who gave these answers, applied to the King and Convention of Estates at Perth, 4th March 1566–7, to have the questions and answers inserted in the books of Secret Council, and to have the authority of the King and Estates interponed thereto. This is ordered accordingly. (Acts of Parliament, v. 4, p. 110.) But the Church was yet too powerful for the King to obtain an unqualified assent to a limitation of the important right they had assumed of nominating ministers for the chief towns, even though this was to give the people some right by consenting; for in a declaration for the satisfaction, as it is said, of such as were not present, which was made in the next Assembly, it is declared,—“ Anent the article concerning provision of pastors to burghs, that the reason thereof was and is, That his majesty was content and promised, where the General Assemblie findeth it necessary to place any person or persons in any of the said towns, his Majesty and the flock shall either give their consent, or else *a sufficient reason of their refusal*, to be proponed either to the whole Assembly, or to a proper number of the Commissioners thereof, as his Majesty shall think expedient.” (Calderwood, p. 407.) So that the Church still claimed the right of nominating ministers in burghs, and the flock was bound to assent or to give a sufficient reason for withholding their consent.

Thus, then, when the right of choosing a minister was to be in the judgment of the eldership and consent of the congregation, this consent was implied if no specific objection was made, and could not be withheld without establishing a satisfactory one: and this corresponded with the practice of the Church. When a lay patron presented, it was so too; no distinction was or could be made.

This Assembly 1597 first required that ordination should be by imposition of hands; and it is well known with what difficulty the celebrated Mr Robert Bruce, the first of Kinnaird, submitted to this, after having been eleven years a minister of Edinburgh, without any such ordination. (Calderwood, p. 423.) The details of this will be found also in Spottiswood, p. 451.

As a proof how little at this time the consent even of the people was regarded, I may notice the contest which took place in 1591, as to the settlement of a minister at Leuchars. The Presbytery of St Andrews, of which Melville was a member, acting on the rule laid down in the Second Book of Discipline, convened at St Andrews for the election. There were two candidates; Melville

and six members of the Presbytery supported one, and twenty members gave their suffrages for the other. Melville and his party separated, went to the school-house, and appointed the other candidate; both were instituted and admitted to the church in one day. The gentlemen of the parish went likewise into factions, some holding with the one and some with the other, which caused a great scandal. It was ended by the Synod of Lothian sending some of their number, who not being able to bring the parties to agree, removed both the ministers and appointed another. (Spotiswood, p. 385.) Now Melville and his party never pleaded any support for themselves against the major part of the Presbytery, from the interests or inclinations of the people. That enters as little into the discussion as to the validity of the induction, as it did in the election originally.

I give the following as illustrations of the mode of electing ministers for towns at this time, both before and subsequent to the establishment of the Presbyterian form of church government.

“6th December 1681.

“The quhilk day Mr W. C. bailzie and being commissioner for the Citie to the Generall Assemblie to procure ane pastore for the Kirke of St Androis, comperit befor this Assemblie of St Androis, and for declaratioun of his diligence, exhibitit this act of the Generale Assemblie quhilk followes in effect:—Acta Sessione 19, 31st October 1581.—Anent the provisioun of the Kirke of St Androis of ane pastore, The Kirk hes thocht it meit that the Priour and town of St Androis nominat ane of the brether quhome thai haif best lyking of to serve the cure, and to propone him unto the ministers of the king’s house, ministers of Edinburgh (six other ministers, specially named among whom is Andrew Melville), the lairdis of Braid, Pilrig, Culluthy, and Lundy, to quhome the Kirk gevis commissioun, or to ony aucht of thame, to give assent in thair name thereto, and place him ther; providing thai find na lawfull and ressonabill impediment proponit that may stay thair placing (him) ther.” The minute further bears, “The Sessioun, for performing of the desyre of the said act, ordainis (certain persons named) to pas all togedder to my Lord Earle of March, priour of Saint Androis, and travell with his L. for ane ressonabill stipend to Mr Robert Pont, quhome the sessioun thinkes meit to be minister of this paroche, and to report ansuer hereof agane this day aucht dayis.” (Register of St Andrew’s, in Report on Patronage, p. 473.)

Here, then, is the General Assembly delegating their power to choose a minister for St Andrews to certain persons, and also appointing others to consent to this nomination. We see no interference on the part of the people in either of these steps. There is no call by them. The power to nominate is given to the town of St

Andrews, and it is executed by the session, which in the language of the Church in such an act, is what is meant by the Town. A popular election was then utterly unknown. It is not till the edict shall invite them specially to object, "if they know ought against his life or doctrine," that the assent of the people is asked. Pont was at this time minister of St Cuthbert's; he had been in 1572 appointed one of the Judges in this Court, which he held till 1584. (Haig's Senators, p. 151.) He is the only Protestant clergyman who ever sat on this bench. He remained only one year at St Andrew's, as Lord March could not be prevailed on to provide a stipend for him from the rents of the Priory.

Again, subsequent to the establishment of Presbytery, there was no change in this respect, as appears by the following entry regarding the appointment of a minister to Perth in 1595.

" 23d June 1595.

" Whilk day the session being convened, all in one voice, after sundry and diverse times hearing of Mr Wm. Cowper, nominate by the Commissioners of the General Assembly, Synodal and Presbytery of Perth, have allowed of his doctrine, and at his returning, shall accept of him to be their minister, and a fellow-labourer with Mr John Malcolm their present minister." (Register of kirk-session of Perth, Mr Scott's MSS.) The nomination is by the Church, and the only appearance of any concurrence of the congregation, is after he had preached to them, and this is by the session; and what they do is to allow, that is, approve his doctrine, for this was before the king's struggle in behalf of the people. Mr Cowper was afterwards Bishop of Galloway, and from his "Life" it appears that he had a letter of nomination written by order of the convention of the Commissioners of the General Assembly, who met with the synod and presbytery of Perth, on 8th April 1595, also a letter of concurrence from the Council of Perth, and private letters from some of the members of the kirk-session, encouraging him to hope for a comfortable settlement. But there was no call from the congregation. He was transported from Bothkennar.

Mr Dunlop, in his Parochial Law, p. 267, refers to M'Crie's Life of Melville for an instance of a written call, in 1597, in favour of a minister to Gullane, in the Presbytery of Haddington. I think nothing but the zeal to support a favourite theory could have blinded the reverend author so far as to exhibit this as evidence of a call at this early period of the Church, at which time, most unquestionably, it did not exist in concurrence with a presentation by a patron. For it is well known that Gullane was one of the churches which had belonged to Dryburgh Abbey.—(Chalmers's Caled., v. 2, p. 519.) On the destruction of that monastic institution, the patronage of its churches was seized by the

Church ; and the document extracted from the Record of the Presbytery of Haddington is not a call addressed to a probationer, but is just a petition to the presbytery from the minister and the parishioners, in consequence of the age, infirmity, and other diseases of their pastor, and the proof they have had for two years of the good life and sound doctrine of his son, which made them “ with ane voice thinke expedient maist earnestly to request your “ wisdoms to proceed to the admission and ordination of ” (the minister’s son) “ the said Mr Andro.” The presbytery having the right of nomination, this petition, in which the minister is the first applicant, was most properly addressed to them for the appointment of his son as his assistant. It does not in the least partake of the nature of a call addressed to one inviting him to be their minister. It is a petition merely to those exercising the patronage. The only thing to be remarked in it is, that it speaks of the ordination of the person they request to be appointed as their minister, a ceremony just then adopted in the Church.

From 1612 to 1638 Episcopacy was established. The practice during this period is not held to be of importance in this question. But I think it cannot be overlooked, if the change of Church government indicate no change as to the right of the people in the choice of their minister, even when a more settled ecclesiastical constitution clearly defined the relative rights of Church and patrons, and curbed the encroachments of the Church under their claim of electing ministers, and more especially when we are specially referred to the period when presentations were given by patrons as the rule to be followed now.

There is no act either of the Church or State during this period indicative that the people had the privilege of calling, in concurrence with the presentation by the patron ; and no other change was made in consequence of the establishment of Episcopacy except that the presentation was now given in to the Bishop, who directed the presbytery to take the presentee on trial ; and, when approved of by the presbytery, the people were invited by an edict from the bishop to compear before him at a place and day named, “ if any have to object to the doctrine, life, and conversation of (the “ presentee) why he may not be ressavit minister of the said kirk.” (Extract from the Presbytery Books of Perth, May 1622, printed in *Lord Advocate v. Robertson of Tullybelton*, February 1833.)

He is ordained by the Bishop if he be not objected to by the congregation concerning his life and doctrine, and then inducted into the church by commission from the bishop.

Mr Dunlop (p. 187), I observe, again quoting from the *Life of Melville*, mentions the settlement of North Berwick, in 1622, as a proof that the people always claimed the right of rejecting a mi-

nister. I refer to it as a further illustration of the statement, that they never had any other right than to state and substantiate relevant objections. In that case a Michael Gilbert was presented by the Crown. The presbytery took him on trial, and allowed his "gift and holie affection sufficient, juges him able to enter on the "ministrie quhere it sall please God to call him, with consent of the "congregation," but they thought him not meet for that place as the people dissented. The congregation objected only that they had no lyking of him, and thought him not meet for the place. They stated no specific objection against him; and, although it appears that both the archbishop and the presbytery were very willing to go into the views of the people, he was finally admitted, because they could not object specially to his life or doctrine. This is a strong proof that the rights of the people, as settled in 1597, still continued unchanged, and that they could withhold their consent only by assigning proper reasons. The claim to any higher privilege was disregarded.

During all this time we hear nothing of this alleged law of the Church. The election was not in the people, nor had they a *veto* on the election of the Church or on the presentation of the patron. The declaration in the Second Book of Discipline depends on the election being in the presbytery, and is distinctly said to be inconsistent with the subsistence of patronage; but we see patronage did continue: it was confirmed by the State, and acquiesced in by the Church; and we never hear, during all this first period of the Presbyterian Church, of this law, or of any attempt to get rid of patronage as being opposed to it. Among the numerous grievances which the Church brought forward at this time, patronage is never mentioned, though its abuses are sought to be corrected; and this, not by abolishing the right itself, but by having it placed under such control as to prevent such gross perversions as we have seen. The declaration is never, so far as I know, alluded to during all this period in any proceeding of Assembly till 1638,—a very remarkable fact, considering how often patronage was a subject of regulation, and its abuses of correction.

If to allow the people to object specially, under the invitation of the edict prior to the ordination, was not giving the people exactly the same place which the Church had assigned to them, as their full privilege and proper position in the course of constituting the pastoral relation between them and their minister, whether nominated by the General Assembly, the presbytery, the elders, the heritors and elders, or the lay patron, it was at all times open to them and to the Church to claim their supposed rights; and there were times when this more particularly became the duty of the Church, and could not have been overlooked. Thus when, in 1604, Parliament was summoned to take into consideration a union

of the kingdom, the ecclesiastical commissioners entitled to vote in parliament asked instructions from their brethren. (Cooke, v. 2, p. 149.) The synod of Fife, influenced by the Melvilles, returned an important answer concerning the good of the Church: nothing, however, is said about this right of the people, or their not being in possession of what was their privilege in the choice of their pastor.

Again, the presbyterians, in 1633, drew up "Grievances and Petitions concerning the disordered state of the Reformed Church in Scotland," which they presented to Charles I. on his arrival in Scotland; yet there is nothing here about the people being deprived of their rights in the choice of their minister. (Cooke, v. 2, p. 346.)

And again, in the Assembly 1639, the same silence on this point is observed in the statement of grievances under which the Church was said to labour. But it was not at this time conceived, either by the Church or people, that they had any further right than to object, for cause shewn, and it was not the policy of the Church to allow any further interference on their part.

In 1638, the Episcopal form of church policy was overthrown by the Assembly which met at Glasgow, who, in contempt of an act of Parliament, continued sitting after the Commissioner had declared the Assembly dissolved; and who, of their own authority, annulled the resolutions of six prior Assemblies, some of which had been expressly confirmed by Parliament. It was this Assembly which approved of this article "Anent the presenting either of pastors or readers and schoolmasters to particular congregations, that there be a respect had to the congregation, and that no person be intruded in any office of the kirk, contrare to the will of the congregation to which they are appointed." (Acts of Assembly 1638, p. 38.) This is not said to be declaratory of the former law or practice of the Church: it is brought forward as a new proposition, and, as the record states, "The Assembly alloweth this article." And, except, in so far as something similar appears in the First and Second Book of Discipline, but was never otherwise asserted by the Church, this is the first declaration of this principle. The proceedings of this Assembly were not ratified by Parliament; but a treaty was entered into between the King and the Covenanters, that a General Assembly should be held next year, in which "no allusion should be made to the obnoxious Assembly in Glasgow," but that what it had sanctioned should be re-enacted. (Cooke's History, v. 2, p. 495.) This was held accordingly, and its proceedings ratified by parliament 1640. (Acts of Parliament, v. 5, p. 291.) But I do not find the above declaration renewed. It is remarkable that among the grievances alleged (there are six of them), there is nothing as to patronages or the exclusion of the people in the choice of their pastors. (Acts of Assembly, 1639, p. 7.)

After this time the influence of the Church was very great, and nothing could have been easier than for the General Assembly to carry into full effect the right of the people, if either the election of the minister, or a *veto* upon the presentation by a patron, had been the meaning of the declaration that none should be intruded contrary to the will of the congregation; or at least, if lay patrons were able to resist this as to their patronages, the evil might have been much diminished by what was fully within the power of the Church, by allowing it in all those cases where they at this time acquired the right of presenting. Thus, by 1640, c. 9, presbyteries were to provide and admit to the kirks of which the bishops had been patrons, "but prejudice of the interest of paroches, according to the acts and practice of the Kirk since the Reformation." (Acts of Parliament, v. 5. p. 299.) In the very next year an act is passed anent non-covenanting patrons, that "it shall not be lawful to them to present to the kirks vacand, but that the planting of the said kirks, and admitting of ministers there to, upon sute and calling of the congregation, shall pertain, *pleno jure*, to the presbytery, quile the said patrons subscribe the said national oath and covenant." (Ib. p. 389.) The sute and calling of the congregation I understand to mean the prayer and request of the congregation to the presbytery to act: for it is not merely that they are to admit or confer the pastoral office, and constitute the pastoral relation between the pastor and the congregation, but they are to plant, as contradistinguished from the admission; and this, in the language of the time, always means the choosing, or, as it is called in the Second Book of Discipline, the election previous to the admission; and, in uniformity with what is there laid down, it is here placed in the hands of the presbytery.

The object of the Church at this time was to carry into effect their original claim, and they proceeded step by step to do so. They first prevailed on the king to consent to receive a leet of six persons from the presbytery, out of which the king was to present a minister; and in the Highlands the king was to accept a list of as many expectants as can be had able to speak the Irish language. (Act of Assembly, 3d August 1642, p. 32.)

Not satisfied with this, they, in the next Assembly (Ib. 19th August 1643, p. 26), press the Commissioner to recommend to the king to accept a list of three for each vaiking kirk in his majesty's presentation, and one for the Highland churches; which the commissioner, Sir Thomas Hope, whom Burnet (History, v. 1, p. 23.) designates as in all respects a zealous puritan, promised to do.

At this time the Church was predominant over the State; their decisions directed the administration of Scotland; and they were in the closest union together. (Cooke, v. 3, p. 58.) We are told,

“ That the Assemblie sat down ilk day be aucht houris in the morning, and continewit till 12 houris, syne went to dynner: at twa houris thay advysit and consultit with the Conservatouris of the Peace, or Conventioun of Estaites, and Secret Counsall, of what thay had bein doing, whill sax houris at evin, syne dissolvit and went home.” (Spalding's Troubles, v. 2. p. 142.) Every thing even connected with the State was regulated by them, and therefore the ordering of church matters was fully in their own power: and if it had been a fundamental law of the Church that no pastor shall be intruded on any congregation contrary to the will of the people, and if the meaning of this was, that the people should have a direct vote, or even a *veto* upon the nomination, there could have been no difficulty in so framing the statutes 1640 and 1641, as well as those I am now to mention.

The leet to his Majesty was not thought sufficiently restrictive of his rights, and accordingly the Convention of Estates, which met in January 1644, and which had usurped the power of the government, having received an act of the commission of the Assembly “ for planting of kirks of his majesty's patronage during “ these troubles,” authorized presentations to pass the cashet and privie-seal, as if the same had passed his Majesty's royal hands, and commanded the commissioners of the Treasury to receive presentations from presbyteries, and to sign and expedite the same. (Acts of Parliament, v. 6. p. 66.) Thus the right of presenting, in all crown patronages, is acquired by presbyteries. This act is afterwards ratified in Parliament 1644. (Ib. p. 129.) In this same Parliament, presbyteries obtained a farther accession of patronage, by discharging patronages belonging to particular ministers in right of their benefices, declaring these to be null; “ and that presbyteries, in their several jurisdictions, have the “ only power of planting and providing these kirks *proprio jure* “ in all time hereafter; but prejudice, to the interest of the parishes, according to the acts and practices of the kirk since the “ Reformation.” (Ib. p. 128.)

In what was termed the 5th session of the First Triennial Parliament (1646), the act 1641 as to non-covenanting patrons was extended so as to embrace a very wide class of lay patrons; for it was now made to comprehend all “ who had not subscribed the “ league and covenant, or that is, or shall be excommunicate; and “ also, who is, or shall be faulted for whatsoever cause.” Their kirks are to be provided and planted by the presbyteries *pleno et proprio jure*, in all time coming: “ declaring that this shall always “ be according to the propositions of ordination of ministers, agreed “ upon by the assemblies of both churches, and ratified by the “ Parliament of this kingdom.” (Act of Parliament, v. 6, p. 215.) This refers to the form of presbyterial Church government, introduced at this time, which, however, made no

alteration whatever in favour of the people. It did not abolish patronage: it states that the person to be ordained "being either nominated by the people, or otherwise commended to the presbytery," of course, by the patron, or by the law which had devolved the patron's right upon the presbytery, and which this act thus referring to this form of ordination had enlarged in their favour; the presbytery are to take him upon trial: on being approved, he is to be sent to preach, for three several days, to the church where he is to serve; on the last of these three days, an intimation in writing is read before the people, and afterwards affixed on the church door, summoning a competent number of the congregation to appear before the presbytery, to give their consent and approbation; or otherwise to put in, with all christian discretion and meekness, what exceptions they have against him. And if, upon the day appointed, there be no just exception against him, then the presbytery shall proceed to ordination.

This form and directory being approved by the General Assembly, is also sanctioned by act of Parliament. The Assembly did not hold themselves entitled to introduce a form of church government, or to make changes by internal regulations, as it is called, without the sanction of the State. In this matter of ordination, however, it is plain the people's interference was not till after the trials by the presbytery, and their consent was expected and assumed, unless just exceptions could be shewn.

Having thus acquired the right of presenting ministers in so many parishes, the church never thought of bestowing the right of nomination on the people; all they did was, by an act of Assembly, 18th June 1646, to "recommend to presbyteries and synods to consider the interest of the particular congregations in the calling and admission of ministers." (Peterkin, v. 2, p. 69.)

As yet, then, we hear nothing of a call by the people. In how many cases now was the right of presentation in the various presbyteries, *pleno et proprio jure*; but the people were merely invited by an edict previous to ordination, to state any objections they might have to the presentee's life and doctrine, and, no doubt, the Church would hold the congregation, in the words of the First Book of Discipline, "unreasonable, if they refuse him whom the church did offer; and that they should be compelled by the censure of the council and church, to receive the person appointed and approved by the judgment of the godly and learned."

To shew that at this time the people had no other power, and had no right to call, or even *veto*, a minister, I notice the proceedings of the presbytery of St Andrews, in the year 1648, in the admission of one to be minister of Crail, who, as unfortunately for himself as for the Church over which he was afterwards called to preside, has obtained a melancholy celebrity in the history of this

country. (Register of the Presbytery of St Andrew's, printed by the Abbotsford Club.)

On 3d November 1647, a presentation by the Earl of Crawford, patron, in favour of Mr James Sharpe, to be minister of Crail, is presented, "and requiring the presbytery to enter him to his trials to that effect. Mr Sharpe is to be advertised to be present next day."

November 17, "Compeared commissioners from the parish of Crail, desiring the presbytery to proceed in putting Mr James Sharpe on his trials, according to the presentation given last day," &c. There is nothing here about the presbytery moderating a call to him; on the contrary, they are asked to proceed to his trials, in virtue of the patron's presentation.

His various trials accordingly proceed successively on the 1st, 25th, and 29th December; and 13th January 1648, "Mr Sharpe is fully approven by all in all parts of his trials in relation to that charge whereunto he is now called. Mr James Makgill is appointed to serve his edict the next Lord's day, and to return the answer thereof to the ministers of St Andrew's on Wednesday, and if nothing be objected at that tyme, the day of his admission is appointed to be this day fifteen days, when Mr James Bruce is to preach."

"January 27. The presbytery met at Crail for admission of Mr James Sharpe, minister there, when Mr James Bruce did preach."

Thus we see that up to this period there was no change in the practice of the Church in the admission of a minister upon a presentation. The presentation was the initiatory step, which called upon the presbytery to take the presentee on trial, and the people were not called upon to interfere till he was fully approved of by the presbytery, and then they were warned by an edict to state any special objection to his admission which they might know of.

Usurped authority is never an easy yoke; so the Parliament found; and it is instructive to read how they winced under the assumptions of the Church, as exhibited in the declarations they were under the necessity of addressing, from time to time, to the several presbyteries of the kingdom. In a circular letter (11th May 1648; Acts of Parliament, v. 6, p. 321.), after speaking of their great compliances with the many desires of the commissioners of the General Assembly, and that they have never wronged or violated the true privileges and liberties of the church, they complain of the great encroachments made on their unquestioned rights: "For what can be more civil than to determine what civil duties we ought to pay to our king? or what civil power he ought to possess? * * * * Is it a subject for the dispute of Church judicatories, whether his Majesty hath a negative

“voice in Parliament;” with more to the same effect, alluding to some most extraordinary propositions for limiting the prerogative of the Crown, submitted to Parliament by the Assembly. The estates of Parliament were obliged next month (10th June 1648; Acts of Parliament v. 6, p. 331.) to publish an act against a recommendation by the commission to presbyteries to censure those ministers who declared for the Engagement, and requiring all to declare its unlawfulness to their people; “thus usurping a power to be judges of the laws and proceedings of Parliament, who, by the fundamental laws of the kingdom, have in them the only legislative power, namely, in publick engagements in peace or war.” Moreover, the Parliament is obliged, (Acts of Parliament, v. 6, p. 332.) to condescend to answer the supplications from synods and presbyteries, that as “their present proceedings for the good of religion, his Majesty’s rescue and safety, and the true peace of these kingdoms, is much misconstrued and misunderstood, they have thought fit to declare for the satisfaction of all *such as are satisfiable*,” the principles on which they act, and the object they have in view,—the preservation of religion in Scotland, and that the undertaking for the king shall ever be subordinate to religion and their duties to God, employing those only who had signed the Solemn League and Covenant.

We have now arrived at the important act of the Convention of Estates 1649, which, for the first time since the Reformation, abolished patronage and presentation to kirks, whether belonging to the king or to any laick patrone, to presbyteries or others within this kingdom, as being unlawful and unwarrantable by God’s word, and contrary to the doctrine and liberties of the kirk; and it is enacted, “that whosoever hereafter shall, upon sute and calling of the congregation, after due examination of their literature and conversation, be admitted by the presbytery into the exercise and function of the ministry, in any parish within the kingdom, the said person without a presentation, by virtue of their admission, hath sufficient right and title to possess,” &c. (Acts of Parliament, v. 6, p. 412.)

Considering the course of statutory enactment ever since 1638, a wonderful change must have occurred in the sentiments of the legislature, when a presentation by a presbytery was declared unlawful and unwarrantable by God’s word, as well as in the opinion of the Church, which still influenced the State in Church matters. But the history of these troublous times accounts for this revolution in opinion; and it is impossible to ascertain what weight is due to the proceedings of the State and the Church at this time, without recalling some historical recollections. The Marquis of Hamilton, and the more moderate of the covenanters, who had taken

up arms to enforce the understanding on which the King had been surrendered into the hands of the English army, "that there be no harm, prejudice, violence, nor injury, done to his royal person," having been defeated at Preston by Cromwell (15th August 1648), Argyll and the violent party of the Church now gained the ascendancy; they welcomed Cromwell to Scotland, and it was settled that a Parliament should be called, from which all who had consented to the engagement with Hamilton were to be excluded. The same exclusion took place in the Church Assembly; all the ministers who had been friendly to the Engagement, or who had not violently exclaimed against it, although one part of the Solemn League and Covenant expressly related to the same object, the preservation of the King (Cooke, vol. 3, p. 167, 168), were many of them deposed, or obliged to leave their churches. An act of Assembly was published for censuring ministers for their silence, and not speaking to what are called the corruptions of the times (Act of Assembly 3d August 1648, p. 38), in which the engagement holds a conspicuous place. It was the censure of his presbytery, on this account, upon the excellent Leighton, which drove him from his church of Newbattle, and drew forth this memorable remark, "If all the brethren have preached to the times, may not one poor brother be suffered to preach on eternity?" One may be forgiven for not holding in very high respect a church, when ruled by a party which could extrude from its ministry one whom Burnet truly designates as an apostolical man: (History, v. 1, p. 297.) While the laymen who had undertaken the Engagement, were obliged to repent in sackcloth before the Congregation, and subscribe a declaration, which it must have been hard for them to swallow, or to suffer excommunication, at that time attended with severe civil, as well as ecclesiastical consequences; and, of course, such were excluded from the convention.

Now such was the composition of the convention, and of the Assembly which abolished patronage; and one must surely hesitate to adopt the proceedings of 1649 as a model at present either in our civil or ecclesiastical policy. This is not, I should think, the chapter in the history of our country on which we can dwell with most satisfaction. It was the well-known Samuel Rutherford, with Guthrie, Livingston, and Gillespie, the leaders of those afterwards known as Remonstrants or Protestors, who first broached the notion, that "patronages and presentations to kirks are sinful and unlawful;" and it was the influence of this faction which produced the very severe act of Classes of Delinquents in 1646 (Acts of Par. v. 6, p. 203); and the most oppressive act for enforcing it by real and personal diligence (Ib. p. 209); also the act 16th January 1649, repealing all acts of Parliament or Committee for the late unlawful engagement, and, finally, the act abolishing patronage.

After abolishing patronage and presentation to kirks, the act 1649 goes on thus—"Because it is needful that the just and proper interests of congregations and presbyteries in providing kirks with ministers be clearly determined by the General Assembly, and what is to be accounted the congregation having that interest, therefore it is seriously recommended to the next Assembly clearly to determine the same." This was done by the Directory for the election of ministers, enacted in obedience to the above recommendation, and to follow out what was left for them to do, in order to carry into effect this new state of the law, when the minister was no longer to be presented by the patron, but elected by the congregation. Now, although the Church had it thus in their power to leave the nomination with the congregation at large, or to restrict it to the heads of families, in the first case allowing the minister to be chosen by the majority, and in the other very nearly securing the same object, so that none should be obtruded upon them against their will, yet they enact that it is the elders who are to elect, and the person agreed upon by the session is to be intimated to the people; if they acquiesce and consent, the presbytery is to proceed to the trial of the person so elected. Thus far the fundamental law may be observed. But if a majority dissent, the matter is to be judged of by the presbytery, and if they do not find the dissent founded on causeless prejudices they are to appoint a new election. But if they find it to proceed from such prejudices, they, of course, disregard the dissent of the majority and proceed to the trials and admission. But if a lesser part of the session or congregation dissent, unless they instantly prove their objections, and that they are relevant, the presbytery will proceed. In these two instances, then, a minister will be obtruded against the will of part of the congregation, according to the meaning put upon these words by the act 1834. There is also a regulation at the end which is directly in the face of such a rule:—"Where the congregation is disaffected or malignant, in that case the presbytery is to provide them with a pastor." Those were branded as malignant who had entered into the Engagement. Many congregations had done so, otherwise this regulation would not have been made. These were not to have any voice in the choice of the minister. The presbytery was to provide a pastor for them.

It will be observed that the Directory does not contain the term *call* from beginning to end; it is for the *election* of a minister. By the description given in the Second Book of Discipline, this is said to be the first step in the outward call of a minister, examination and admission being the other two and concluding parts: and although the session is said to meet for the election, the action being moderated in by him that preached, it seems probable that the election by the elders came to be termed a call or invitation, and

the moderation by the minister in the session, came to be termed moderation in a call to a minister, being the first step in the outward call. Thus I find the following entry in Presbytery Records of Kirkwall (Lord Advocate *v.* Lord Dundas, 11th February 1830):—"2d August 1660. The magistrates of the burgh of Kirkwall and the eldership thereof did present a supplication for Mr James Reid, to be conjunct minister with Mr Alex. Lennox, which is granted; and Mr John Hendrie is appointed to order the call," *i. e.*, to put order to it, to moderate in it.

It does not appear that in following out the directory, assents or dissents were given in by the congregation at the period of the election, so as either to be constituents or accompaniments of the election by the elders. I do not say that this was never the case, but, on the contrary, immediately after the election, the nomination is sometimes intimated to the people; but this is not a general rule, which it would have been if it had been any thing else than notice to the congregation, that they be ready to state their objections, more especially when called upon by the edict, at a subsequent stage of the proceedings, to do so. But whether it was so or not, there is never an appointment by the presbytery to moderate the congregation to receive their assents or dissents; and above all, no dissent was received which was not specially set forth, so that the presbytery might judge both of the relevancy and evidence of it, just as the bishop had done during the period of episcopacy. I have not been able to discover a single instance of dissents by the people listened to at this period without objections distinctly stated, whether this be at the one period or the other, whether before or after the presentee's trials.

For the practice adopted by the Church in this matter, between 1649 and 1660, I beg to refer to the proceedings in the presbytery of Elgin and provincial synod of Moray in 1654, relative to the settlement of a minister at Birnie. (App. to Report on Patronage, p. 145.) There were two candidates for this church.

"*Elgin, August 18.*—The presbytery appointed the next meeting to be at Birnie, September 2, when all having interest in the election and calling of a minister to that place are to be present, and then they are to proceed to the election in a formal way."
 "Birnie, September 2.—The presbytery being this day convened to see to the elders thereof their orderly procedure in the election of a minister according to the act of the General Assembly 1649: the election was continued till 15th September, in order to see if more unanimity would be obtained, and heritors, elders, and all having interest required to meet that day. "*Elgin, September 15.*—The said day the elders of Birnie being called in, were put solemnly in remembrance of their oath of eldership, and exhorted to deal according to conscience in this present election; and

“ being severally inquired which of the two they would elect, five of the elders voyced and elected the one, and three of the elders voyced and elected the other ; and being all removed, the foresaid five did give in a supplication, subscribed by themselves and all the heritors not actual elders, offering Mr A. D. to be tried by the presbytery according to the order of the Church ; but the three did protest against it, and gave in their former pretended call for Mr R. D.”

“ *Elgin, October 1.*—The debates anent the plantation of the Kirk of Birnie, are referred to the next provincial assembly.”

The discussion goes on at the synod till 2d February 1659, when “ it was concluded by a plurality of voices, that Mr A. D. his call was the formal call, and that the presbytery of Elgin, in respect of the said formal call, should forthwith proceed to his trials.”

“ *Elgin, February 17. 1659.*—The act of the synod for entering Mr A. D. to his trials, in order to the Kirk of Birnie, was produced, “ and the said Mr A. D. being present, the presbytery did “ condescend to admit him to his trials, according to the said “ act.”

He was settled at Birnie on 22d June 1659. Now here, though heritors and all interested are summoned to attend besides elders, it is the elders alone who voice and elect ; this is the call ; on its being decided which is the formal call, the person so called is then to be taken *forthwith* on his trials. No reference is made to the people, no moderation in a call by them is proposed, no consent or concurrence asked from them at this stage of the proceedings, till the edict is served before his ordination.

Take further the case of one of the last settlements prior to the Restoration, the appointment of Mr Bennet as minister of Hailes, now Collington.

The presbytery had sent three candidates to preach : The minutes of the kirk-session bear :—“ *Hailes, 28th June 1659.*—The “ minister who preached produced a commission from the presbytery to moderate in the election of one of the three heard by us. “ In order hereunto, the session having rehearsed the list of the “ three by them heard, viz. * * * and the several members “ of the Session being called severally for their vote, which of the “ three they did choose, the whole Session except one did make “ choice of Mr R. B. Whereupon the heritors who were not upon “ the session being called, compeared the Laird of Collington and “ J. A., and the election being made known unto them, they did “ declare their hearty consent with the choice of the said Mr R. B. ; “ and the church-officer having called thrice, if there were any “ else in the name of an heritor besides, and none else appearing, “ this Session did appoint this their election to be made known to “ the presbytery the first presbytery-day, and appoint three elders “ and J. A. heritor, to signify to them the election, and to desire

“ the presbytery to call the said Mr R. B., and to deal as they see fit, to cause him to accept of the said choice, and that he may be speedily entered upon his trials, that so they may be no longer destitute of a minister.”

“ 18th September.—Mr J. S. did preach this day, and served the edict in order to Mr R. B.’s admission.”

“ 28th September.—After sermon Mr R. B. was admitted minister at Hailes.” (Inquiry as to Electing Ministers, by Logan, 1733, p. 115.)

Now, no intimation is made to the people at the time of the election, although those heritors who are not elders are invited to concur. This was very common at this time. Still the election is by the elders alone, and the people are not invited till the edict is served; and this was only an invitation to state and substantiate objections not proceeding from causeless prejudices.

But, in truth, there never was a time when the voice of the people was less attended to in the choice of their ministers, than during the period from 1649 to 1660. A violent party was at that time predominant; for it is almost a universal rule in the history of change and revolution, that power falls into the hands of a few, the most active and zealous of the party. So was it here. The power of nomination came to be acquired by Rutherford, Gillespie, and their friends, who had obtained the repeal of patronage; for a few of the leading protesters obtained an act of Cromwell’s Council, dated 8th August 1654, commonly called Mr Gillespie’s ordinance, which concludes in these remarkable terms:—“ And for the better propagation of the gospel, and advancement of godliness in Scotland, be it ordained by the authority aforesaid, that the Commissioners for visiting the Universities, Colleges, and schools of learning in Scotland, do take especial care that none but godly and able men be authorized by them to enjoy the livings appointed for the ministry in Scotland; and to that end, that respect be had to the choice of the more sober and godly part of the people, although the same should not prove to be the greater part; and that none shall be by them authorized or admitted into any such living or benefice but such as shall be first certified by the persons hereafter mentioned, or any four or more of them, whereof two to be ministers, to be a person of a holy and unblameable conversation, disposed to live peaceably under the present Government, and who, for the grace of God in him, and for his knowledge and utterance, is able and fit to preach the gospel.” (See Lamont’s Diary, 3d Dec. 1654, p. 101.) This act is further enforced by another act of Council, dated 17th October 1655. Rutherford, Guthrie, Gillespie, and Livingstone are among those who had thus in their hands the absolute control as to the choice of ministers, as they might decline to give the required certificate. The voice of

the majority of the people, *i. e.* of the elders, was not to be regarded against the selection by those whom these commissioners chose to designate as the more sober and godly part ; thus legalising by an act of what was then the Government, the concluding clause of the Directory in the case of a congregation being disaffected or malignant, only withdrawing the election from the presbytery, and giving it to these commissioners. In either case the people's voice was not listened to.

The tyranny of the Church and of the ecclesiastical commissioners of the period, extended to the most private concerns of the most retired families. How fully was the opinion of Calvin exemplified as to the danger of unlimited power in the Church : “ *Est igitur Ecclesiastica Potestas non malignè quidem ornanda, sed includenda certis finibus ; ne pro hominum libidine huc atque illuc trahatur. Nam si simpliciter hominibus concedimus, quam sumere ipsis visum fuerit potestatem, omnibus in promptu est, quam sit proclivis in Tyrannidem lapsus, quæ procul a Christi Ecclesiâ abesse debet.*” (Calvini, Inst. lib. 4, c. 8, § 1.) The claim to the power of the keys never was carried higher in the Church of Rome than it was by the dominant faction of the Church of Scotland at this time. It was broadly asserted “ that prophets and pastors, as ambassadors of Christ, have the keys of the kingdom of God to open and to let in believing princes, and also to shut them out, if they rebel against Christ.” (Rutherford, Preface to *Lex Rex*) And because the priests in the Romish Church easily granted absolution for such offences as the penitent brought in secret to the confessional, the Kirk insisted upon the performance of public and personal penance, of which the tendency was to harden the feelings of the individual, to shock the delicacy of the congregation, if it did not lead to worse consequences. Take this as a specimen of penance for an offence where the evidence was probably not such as to make it cognisable by the criminal court, but had been wrung from the offender by ecclesiastical process. “ 26th Nov. 1651.—Compeared Jean Cuming, referred to the Presbyterie be the Session of Dycke : was ordained to make publicke profession of repentance in sackcloth, barefooted and barelegged, in the said church 52 Sabbaths, for her haynous and odious sin of Incest confesst be her” (Register of Presbytery of Forres) ; and yet these are the times we are desired to look to by some as the model for the actings of the Church at the present day—the glorious Second Reformation of the Church of Scotland, as it is sometimes termed.

I need scarcely remind your Lordships, that, in the exercise of this great power, these Commissioners could not be restrained by the Assembly of the Church, supposing that body inclined to control them, for it was not now allowed to meet. General Monk, who then commanded in Scotland, had, in 1653, dispersed the As-

sembly, and leading the members a mile out of town, commanded them to return home (Baillie's Letters, v. 2. p. 369); and the Assembly never met again till after the Revolution.

Not satisfied with the power they had got by the act of Cromwell, the Protesters wished it to be still further extended, and all shew of choice of the pastor taken from the congregations, *i. e.* the elders, and placed in the hands of a few of their number. This appears from a letter of Baillie's in December 1655 (Baillie, v. 2. p. 404), who says, they insisted among other things, that "all plantations must be taken from the congregations and sessions, to be put in the hand of a few whom they count the godly party. By this device they hope quickly to fill all vacant places with entrants of their faction, as they are careful to do whenever they have power to do it;" and they proposed that "a few of them name some twenty-nine of their faction, which were of the commission 1650, to be a settled judicatory, with absolute jurisdiction over the whole Church, ever while they think time to call a General Assembly." They did not, I believe, succeed in this ambitious project; but their influence was as great, though less directly exerted, under the Protector's act of council, and Monk's support, and the voice of congregations was not heard in the choice of ministers, if opposed to their views.

Having thus traced the history of the Reformed Church of Scotland during the first century from its establishment, and seeing the practice during that period which prevailed as to the choice of ministers, I must own I am at a loss to comprehend how it can be said to be a fundamental law of the Church, that no pastor shall be intruded on any congregation contrary to the will of the people, if this means that the people are to have a voice in the election, or even a *veto* upon it, or if it means any thing more than that they may object specially to the minister proposed, and if their objections be sufficient and proved, that he will not be admitted as their pastor. A law is a rule established by authority, to be obeyed by those subject to that authority; and if the law be fundamental, we should expect the obedience to be most uniform, and every departure from it instantly checked, and prevented for the future. Now, have we hitherto found this law established and observed in the Church? Quite the reverse: the people thus far have never had the choice of their pastor, neither have they had the right to reject one without establishing sufficient grounds for doing so. The declaration, it will be recollected, is to be found both in the First and Second Book of Discipline. By the first, a shew of election is given to the people, and it may have been that patronage, both lay and clerical, was not to be continued in the Reformed Church. But this measure, if truly contemplated, was not carried into effect. Patronage, and particularly patronage by the Church, was firmly established, and the principle was no

further insisted in. When the same words occur in the Second Book of Discipline, it cannot mean that non-intrusion is attained by giving the people the choice of their pastor, for at the very moment this declaration is made, the election of a minister is claimed for the presbytery, though it is added, with the assent of the people; and it is further said, what is very obvious, that this cannot be effected unless patronage be abandoned. But the lay Reformers would not consent to surrender this right, and give the Church the power of choosing ministers for the people. Hence this measure also proved abortive, as the original plan had done. The declaration was not acted upon; it became inoperative; it was practically abandoned and forgotten. We hear no more of it till the Assembly 1638, among other of its violent and usurping proceedings, revert to this principle, and for the first time enact it as a declaration by the Church; for hitherto no act of Assembly had sanctioned it. Now to such a declaration made, but not acted upon, nay abandoned by an opposite practice, I oppose the solemn declaration of the Church to the Sovereign in 1565, "Whensoever her Majesty, or any other patron, presents any person into a benefice, the person presented should be tried and examined by the judgment of learned men of the Church; and as the presentation to the benefice appertains unto the patron, so the collation by law and reason belongs to the Church; and the Church should not be defrauded of the collation, no more than the patrons of their presentation." And this solemn declaration of the Church was acted on, and sanctioned by the state by 1567, c. 7, which, along with the preceding act, ratified the Reformed Church; and it was farther confirmed by 1592, c. 116, which established the Presbyterian Church government. It was one of the conditions on which both the one and the other were enacted, granted by the state and accepted with gratitude by the Church. And it does seem singular that, in 1834, these solemn acts of the Legislature should be virtually repealed, by *the Church alone* exercising a right said to belong to it in virtue of a declaration in the Book of Discipline, which sought the sanction of the State, but did not obtain it, and in a matter requiring that sanction, as it regarded a civil right, and where the whole course of practice has been adverse to it.

This declaration, then, was asserted in the Assembly 1638. But it is only in that Assembly that it is noticed: for I think it is not renewed in any of the succeeding Assemblies which were to validate the acts of that Assembly; and the practice continued as before: the people had neither voice nor *veto* in the election of a minister. It was in the patron or the presbytery, with the power to the people to object specially to the life or doctrine of the presentee. These words, however, are introduced into the act 1649, and for the first time authoritatively so: and what is the interpre-

iation put upon them by the Church? This, as has been seen, was not that the people were to have an absolute power of refusing a presentee, still less the choice of him, but that the elders were to nominate, and the people could do no more than they always had a right to do, state objections, of the validity of which the presbytery were to judge. The Church had, by this act 1649, full power to give due effect to this principle: they might have given the choice to the congregation at large, and we may presume would have done so, if it could have been effected in no other way. The Reformers of those days must have considered that they gave it full effect, its genuine meaning, when they left with the people the right to object specially to the nomination either of the presbytery, the elders, or the patron.

The truth is, the phrase was imported among us from Geneva, and its meaning, there at least, is to be found in a very valuable letter of Beza's. He, it is well known, was a minister of the French Reformed Church, and at the conference of Poissy, in 1561, was the speaker on behalf of the Protestants. (Anquetil, *Esprit de la Ligue*, v. 1, p. 89.) He afterwards succeeded Calvin as minister at Geneva, and if Melville is to be considered as the Father of the Presbyterian Church of Scotland, Beza may be reckoned its foster-father. Melville was the pupil of Beza, and when he returned to Scotland, he brought a letter from him recommending him to the notice of the Church. An intimate intercourse was kept up with him during the progress towards the Presbyterian polity: part of the Second Book of Discipline is in the very words of Beza, in the answers he gave to certain queries of Lord Glamis, then chancellor, and his treatise *De Triplici Episcopatu* was expressly written to aid Melville's views. Now in one of his letters (and these letters were well known in Scotland when Knox's History was published, and are referred to in it, p. 199 and 200; Calderwood also mentions these writings of Beza, p. 79) he describes the mode of appointing a minister in the church of Geneva, shewing that it was exactly the same as had been observed during Calvin's time. The classis of ministers select a person, try him, and recommend him to the senate; the senate may reject him, and another must be presented to them. When they approve of the person, "*Itaque demum in publico conventu, die Dominico, in singulis templis civitatis, ac potissimum in eâ ecclesiâ cui vel in urbe vel in agro præficiendus est, editur probati illius nomen, et monentur omnes, ut si quid in eo observaverint, quamobrem sit ministerio indignus, hoc ad magistratum modestè et extra ullam calumniam intra octodecem deferant. Qui demum ita probatus est, tandem publicis coram populo precibus Deo commendatus, et officii sui copiosè admonitus, in possessionem ministerii mittitur.*" Beza's Epist. No. 20, p. 128. Beza, in a subsequent letter, obviously with reference to this interference of the people in the ap-

pointment of their minister, thus writes :—" Itaque illa quidem
 " statui, istos verò in muneris sui functionem mitti non decet, pri-
 " usquam cœtus ecclesiæ fuerit, eâ de re solenni et legitimâ nuncia-
 " tione admonitus, factâ cuique potestate admonendi Presbyterii
 " Christianique Magistratus eorum, quæ tanti esse momenti ex-
 " istimaverit, ut de iis cognosci oporteat, priusquam rata sint Pres-
 " byterii et Magistratus (sicubi Christianus fuerit) præjudicia,
 " nempe ut nemo invito gregi obtrudatur."—(Epist. 83. p. 365.)

Whatever may be now thought of the value of this privilege of objecting specially to the life or doctrine of the minister chosen for them, which existed, as we have seen, in the Church of Geneva, the French Reformed Church, the Church of Holland, of England, and of Scotland, and probably in other Protestant churches, it was the fruit of the Reformation ; for it was at that most important era in the history of the world,—the most important unquestionably in the history of modern times,—that the congregation over whom one was to be placed in the responsible situation of their pastor, first had the power given to them, and were publicly invited, by notice beforehand, to object if they knew any thing which disqualified him for his sacred office among them. In the Romish Church there was not then, nor is now, such a privilege. To be sure, before obtaining the orders of a deacon, and again upon being advanced to the priesthood (see *Pontificale Romanum*) in that Church, an invitation is given to all to declare if there be any impediment against the candidate. But this is a mere form. He is not ordained for any particular charge. The notice to object is by a proclamation in the church during the public service, just before his ordination. And, when the priest is afterwards sent to take the duty of a parish, the people *must* receive him whom the Church sends to them, without objection.

Our Reformers, in their first demands for reformation in 1558, only craved " that parish priests should be elected with the assent " of the parishioners." (Keith, p. 82 ; Hailes' Memorials, v. 3, p. 267.) The Queen-Regent handed these requests to the last Provincial Council which sat in Scotland, and the answer was, that the rule of the Canon Law must continue in observance. When the Reformation was established, the privilege conferred on the people was to assent ; and, in conformity also with the other Reformed Churches, they made this very judicious change, to ordain specially for the charge of a particular congregation, and to give them timely warning, so that the privilege of objecting to the life or doctrine of the pastor designed for them might not be a mere form, but effectual for bringing forward objections if any exist. This was thought by the reformers to secure the full acquiescence of the people in the choice made by the civil or ecclesiastical power that had the right of election ; and is it not clear, from the letter I have referred to, it was Beza's

opinion that if the people were allowed to state any objection they knew of against the person proposed for their pastor, to be investigated by the church and the senate, there could be no intrusion against their will? If these were well founded, they would of course be sustained; if they were not well founded upon due inquiry, then the people would be satisfied, it being the duty of the flock, who had exercised the full extent of the privilege, thought necessary or expedient for them, to accept of the pastor selected by the Church, and confirmed by the Magistrate, who afforded them and their church protection. This being allowed to them, and their objections duly considered, it was not thought to be in the nature of things that any minister could be obtruded upon them against their will; obedience to the Church and the State demanding it as their duty to assent, where they can substantiate nothing to justify withholding assent. This clearly was the meaning of the phrase in the Church of Geneva; as the effect of giving the people this right to state objections is said to prevent intrusion upon the flock; and, when it was imported into Scotland, the practice of the Church, which is reconcilable with no other notion, shews, that hitherto, at least, it retained its pristine meaning, and had acquired no higher one. I shall not stop to quote, from the same letter, the strong terms in which Beza reprobates the idea that the people had any further title to interfere in the choice of a minister. He challenges any one to shew that there is any passage in Scripture sanctioning such a claim, "*quod sanè nunquam comperietur, sed illud potius, ut oves suorum Pastorum et πρῶτες τῆς ἐκκλησίας vocem audiant,*" and then he examines the usual texts referred to by those who say it was admitted in the apostolic times.

But that this was also the meaning ascribed to these words by the Church of Scotland, and their full import, at a time which some reckon the purest in the history of the Church, may be most satisfactorily established by the following extract from a work of the celebrated Henderson, who was the leader of the Covenanters, and between whom and Charles I, when in confinement, and separated from his advisers or his books, passed those remarkable papers on Episcopacy which prove the literary and controversial talents of that unfortunate prince. Henderson was anxious to recommend the very mode of appointing ministers afterwards adopted on the abolition of patronage. (The Government and Order of the Church of Scotland, 1641.) His proposal is, that out of the expectants "one is nominated pastor by the elders, with the consent and good liking of the people. The person nominated is then named to the presbytery, where he is examined in languages, in controversies of religion, &c., and, first of all, of his life and conversation. Being thus examined and found qualified for that charge, he is sent to preach, that the people may have the greater assurance of his gifts for

“edification. After the people have heard him, some minister of the presbytery is appointed to preach to that people, and at the same time a public edict is served, that if any persons have any thing to object against the literature, doctrine, or life of such a man, why he may not be a profitable minister of such a parish, they shall appear before the presbytery, that their objections may be tried and discussed upon the day appointed. The door-keeper of the presbyterian meeting doth call three severall times if there be any to object against the person nominated, and if any thing be alleged against him by any of that particular flock, or any other to whom he is known, it is duly and equally *pondered* by the presbytery; and if it be found to have any weight, or the case be doubtful, the ordination is suspended till a more perfect triall; otherwise, if there be nothing but silence, they use to proceed.

“So that no man is here obtruded upon the people against their open or tacit consent and approbation, or without the voices of the particular eldership with whom he is to serve in the ministry.”

Now, is it not here plain that, in the opinion of Henderson, while the election is in the kirk-session, if the congregation have the power of objecting to the person elected, no man is obtruded upon the people; and that the objection must be special, that it may be pondered on by the presbytery, *ponderanda non numeranda tantum*? The phrase, then, at this time had exactly the same meaning with us as it had at Geneva.

I may further notice, that, although the conduct of the ruling party of the Church of Scotland, during the Commonwealth, had been influenced by the vain imagination of getting Presbyterianism settled as the established form of religion in the three kingdoms, and that for this they sacrificed very important duties, the English Parliament declined to submit to the ecclesiastical tyranny they saw prevailing in Scotland, and, among other notions they disliked, was this of the people's interference in the choice of their ministers, which was thought dangerous to the public peace. The Provincial Assembly of Divines of London published, in 1654, a work entitled *Jus Divinum Ministerii Evangelici*, in which, among other matters, they propound to their people “these ensuing propositions concerning popular election.—(P. 127–133.)

“That the election of a minister doth not, by divine right, belong wholly and solely to the major part of any particular congregation.

“This we shall prove—

“1. By examining these three texts that are brought for the divine right of popular election.

“2. By shewing the mischief that will inevitably follow from this assertion.”

This, accordingly, they do, referring at the same time for more ample discussion of the question to a work by their reverend brother Dr Seaman, entitled *Diatribes*, published in 1647, which bears the imprimatur of Edm. Calamy, and who lays it down (p. 2) that “ordination supposes no election on the people’s part but that which is by way of desire, with submission and reference. This may precede the act of ordaining, but is not simply necessary in all cases. That ministers and elders may ordain none *de jure* in any state of the Church, or in any case, but those whom the people have first chosen, will not easily be proved.” His conclusion is, after discussing the texts of Scripture usually adduced in favour of a popular election, that magistrates, ministers, and people are to concur in the calling of a minister, (p. 18); to the magistrate the nomination and presentation belong, to the presbytery examination and ordination, and to the people consent and approbation. I do not know that the argument drawn from Scripture has ever been better answered than in these two works. Such were the principles of the Presbyterian church in England at this time, and they reprobated popular election as being fraught with much mischief even in a commonwealth. Its supporters, in those days, were those who were opposed to a monarchical form of government.

But to proceed.

On the Restoration it was resolved to change the ecclesiastical polity of Scotland. It is said by the Historian of the Church, whose work will probably never be so popular as it deserves to be, just because it possesses the best and most difficult quality of a history, impartiality, “The way for the subversion of Presbytery was prepared by one of the most extraordinary and unprincipled statutes which was ever sanctioned by a legislative assembly.” (Cooke, v. 3, p. 232.) His zeal for his Church has made him forget his wonted candour and blinded his perception of the truth, for surely he could not have forgotten that he had recorded, not long before, and without much comment, the proceedings of a General Assembly, which, assuming to itself legislative powers, had of its own authority abrogated the acts of six previous assemblies, some of them, too, of many years’ standing, confirmed by Parliament. But be this as it may, Parliament exercised the power of rescinding the acts of all the Parliaments from 1640, restored Episcopacy and with it patronage, requiring patrons to present such persons only as shall give sufficient evidence of their piety, loyalty, literature, and peaceable disposition. The people still sustained the same position which they had always held in the election of a minister since the period of the Reformation, only that the elders did not nominate the minister for their acceptance, but the patron.

There is no dispute as to the practice of the Church at this pe-

riod. There was no call by the people in concurrence with the presentation. There is not a trace of this in the admissions of ministers at this period. It was stated at this time, in reference to the act 1662, "That the receiving a presentation and collation " may be accounted a small matter; but who considers it well, " will find it very weighty. Taking of presentations condemns " the removing of laic patrons, and, which is more, condemns the " call from the people," (Wedrow, v. 1, p. 286); and Burnet states that when the indulgence was granted by Charles II., in 1669, ministers named to churches other than those they had formerly held, "would not enter on the serving them, till the church " sessions and the inhabitants of the parish met and made choice " of them for their pastors, and gave them a call (as they worded " it) to serve among them;" (v. 1, p. 281.) He mentions, however, that they got over their scruples, took possession, and at first the people flocked to them; (p. 282.)

The presentation was received by the bishop. He remitted the presentee to the presbytery for his trials; on being approved of by the presbytery, and being found qualified for ordination, this was notified to the bishop; a day was fixed for his ordination, sometimes at the church he was to serve, but more commonly in the cathedral church, and in either case an edict was published in the church inviting all to object specially. Thus, in the register of the kirk-session of Canongate is this entry, "15th March 1663. The " edict of Mr James Reid to be first minister at the kirk of Haly- " roodhouse, was read at the kirk door in the forenoon in the time " of divine service, and warning given to all that hath any excep- " tion, that they come to the Bishop of Edinburgh his lodging at " the Abbey, the 19th March next, where they shall be heard, and " justice shall be ministrat."

I record the practice during this period, only because the act of Queen Anne refers to the times when presentations were given, as a model for the procedure to be adopted now. I do not refer to this period because the Church was then Episcopal. It is on this very account I so deeply lament the conduct of our rulers both in Church and State at that time, and blush for the honour of my country at the doings which then disgraced the land under the sacred name of religion. But I never can admit that the whole blame was imputable to the ruling party, as it is too much the fashion to do, and that none is chargeable against the Remonstrators, the Cameronians, and Covenanters of that day. Terms of communion were offered to them and refused, which made Calamy, the leader of the Presbyterian party in England, say, "What " would our brethren in Scotland be at, or what would they " have? Would to God we had these offers!" And it is singular how little patronage came into discussion at this time. Even more latitudinarian terms were proposed by the excellent Leighton, who,

now raised to the see of Glasgow, and grievously lamenting the divisions in the Church, endeavoured to effect an accommodation between the two parties so hostilely opposed to each other. Burnet gives a large account of the concessions he proposed, which, as he says truly, "left little more than the name of bishop." (Burnet's History, v. 1, p. 274.) With regard to the ordination of presentees, it was "that bishops should go to the churches in which such were to be ordained who were to serve, and hear and discuss any exceptions that were made to them, and ordain them with concurrence of the presbytery." He says that prior to this "the ordination had been huddled up in their cathedrals with no solemnity." (Ib. p. 275.) But to these proposals even the decent respect of an answer was not paid. They were at once declined. Wodrow has given an intended counter-proposal, which, however, was never allowed to be brought forward (Cooke, v. 3, p. 322), and it is a remarkable circumstance that no claim is made for the people having a larger share in the election of a minister than was allowed under the edict; it is only stipulated, what is plainly implied in Leighton's plan, "That it shall not be in the bishop's power to refuse to concur in the ordination of any persons lawfully presented by the patron and duly tried and approven by the presbytery; and that the ordination be publicly done by the concurrence of the bishop and presbytery at the parish kirk." If the bishop refuses or delays to concur they propose that he be charged on letters of horning. (Wodrow, App. to Book 2d, No. 46.) The proposed accommodation was at once rejected; it failed through the unreasonableness of the one party, and probably would not have been acceptable to the other; and at last this amiable man, of whom it may truly be said, this country was not worthy, worn out by the contradiction he met with on all sides, resigned his anxious charge, and spent the evening of his days in privacy in England. Though dead, he yet speaketh.

I have now brought down this inquiry to the last change which has taken place in the church government of this country.*

* Since this opinion was delivered, "The Life of the Rev. Ebenezer Erskine, by D. Fraser, 1831," has been put into my hands, from which it would appear that I am correct in holding, that a call in concurrence with a presentation cannot date further back than the act 1712, but that I was perhaps too charitable in supposing that it originated in patrons not using their restored privilege, leaving it to the congregation to elect their pastor. For it appears that from the very first a call was insisted in by some members of the Church along with a presentation, contrary to the plain meaning of that act, which they chose to consider as illegal; and that, not content with the efforts and petitions of the General Assembly to get it repealed, they chose to resist it and impede its operation as far as they could, by insisting on a proof of the concurrence of the people, which was to be ascertained by a call. This is too clearly shewn in the above work. For a presentation by the crown having, on 12th December 1712, been given in to the presbytery of Kirkaldy, of which Erskine was a leading member,

We have nothing to do with patronage, except to inquire whether it be established by law as a civil and patrimonial right, and whether it was competent for the Church, of their own authority, to affect and limit it by this *veto* of the people. Whether it be expedient, as some suppose, or unscriptural and hostile to the principles of the Church, as others hold, we fortunately are not called upon to discuss. Ours is a much simpler task, to say what are the rights which the law confers on patrons? At the same time I may notice, as an historical fact, the opinion on this subject of our great deliverer at the Revolution, and the grounds on which that opinion was probably founded. I have already adverted to the ecclesiastical constitution of Holland and Zealand in 1577, and the strong assertion there made of the necessity of patronage being established and confirmed to the state. This was obviously with a view to insure such an intercourse and good feeling between Church and State, as to prevent as much as possible the risk of collision or interference between these separate jurisdictions. The democratic constitution of the Calvinistic Church of Holland no doubt impressed the necessity of such a bond with the States upon the Stadtholder William I, whose political sagacity and military talents enabled the Dutch to free themselves from the oppression of the Spanish yoke, and from the still more grievous bondage of the Church of Rome. After William III. had wielded the power of the States as their Stadtholder for several years, he was raised to the throne of these kingdoms; and, as might have been expected, he inherited the opinions of his great ancestor as to patronage, and reckoned it as necessary in a monarchical state as in an aristocratic republic, that this bond between the crown and aristocracy

their views and intentions as to such were thus expressed at a subsequent meeting:—

“At Dysart, Aug. 13. 1713.

“The presbytery of Kirkaldy taking under serious consideration, that, by the late act of Parliament restoring patronages, occasion is given to a grievous encroachment upon that comely gospel order of ministerial calls or elections; and lest any countenance we give to presentations in that case be construed as receding from the avowed principles of this Church, handed down by our worthy ancestors ever since the Reformation, we do then most cheerfully and with one consent DECLARE, that the relation of pastor and people is plainly founded upon the election, choice, or free consent of a parish thus calling. Next, that the whole extent of patronage power reacheth only the benefice, or legal stipend, without regard to that sacred office. Accordingly, presentations bear no other part in the settlement of a gospel minister, than the private consent of the patron, as heritor or the like, together with his transferring a right to the legal maintenance. And consequential hereto, we do resolve, whatever presentations may offer, to go into no settlement but where the people's freedom of electing their minister is maintained, and made legally and sufficiently evident to us.” (P. 352.) This is a very instructive document, and indicates pretty distinctly the grounds of the resistance to this act, on the strange pretence that patronage did not embrace the right of presentation, except to transfer right to the stipend, and points out the mode adopted for defeating the patron's right by means of a call by the people, which at no previous period in the history of the church they had ever enjoyed.

on the one hand, and the church on the other, whose character is republican parity, should exist: just one of those practical modifications of the effects of the pure elements of a constitution, whether lay or clerical, which so often in the political history of nations are found to afford a balance, and prevent mischiefs which would otherwise ensue; as in the natural world compensating powers are wisely introduced to counteract the effect of disturbing forces, and to bring back and perpetuate the harmony and order of the creation. Besides, he must have observed the great and positive advantages which the Church might derive from patronage, and of which it would more especially stand in need under its Presbyterian form; that its obvious tendency, besides operating indirectly as a salutary check upon ecclesiastical power and clerical assumption, would be to connect the influential laity throughout the land as friends and auxiliaries with the Church and with its Presbyterian form of government, giving them an interest in its concerns and welfare, creating such a union and good feeling between the clergy and laity, as is most advantageous for the Church as well as for the people, both in promoting the great moral and political objects of a national church and church establishment, and in forwarding those schemes of benevolence for the advancement of christian knowledge in this and heathen lands, which it is the peculiar province of the Church to promote, and of the laity to support and foster. And he must have seen how different would be the tone, and character, and usefulness of the clergy, if they were interested only in regulating their studies, and suiting their deportment, and adapting their style of ministrations, to meet the taste and the wishes of the many in their congregations, compared with what these must be when claiming the countenance of the best educated of their congregations. There could be little hope of a learned, a sober-minded, or influential ministry, when obliged to win their way into the Church by the arts and practices necessary for securing favour at a popular election; and there would be much room for disappointment afterwards, even among the electors, if the persons chosen acted on the independence which security now entitled them, and duty called on them, to assume; while they would often fail to obtain the esteem and countenance and support of that class among their parishioners, whose favour it was most useful to secure, but which neither their education, their manners, nor their ministerial qualities, modelled as they now would be, could be expected to do. If this anticipation were to prove correct, what a death-blow would it have been to the respectability and usefulness of the Established Church in this country.

Is there any man bold enough to assert, that if patronage had been abolished a century ago, the members of the Established Church would have responded to the call of the Church by such

noble exertions they are making at this time, by their voluntary contributions, for enlarging church accommodation in this country, and supporting missions in foreign lands?

Accordingly, it is well known that, in settling the church and church government in Scotland at the Revolution, while King William yielded, though unwillingly, to the Claim of Right as to the abolition of prelacy, he was determined to protect the rights of patrons, as appears from certain remarks on the draft of the act 1690, which he dictated to Principal Carstares, and transmitted to the commissioner Lord Melville. (Carstares' State Papers, p. 45.) But he, conceiving that, under prior instructions, he had authority to do so, yielded to the wishes of the Parliament, and gave the royal assent to the act abolishing patronage. This was so contrary to the views of the king, that it was with some difficulty he was prevented from disclaiming his act. He dismissed Lord Melville, however, from his situation in the administration of Scotland. (Burnet, v. 2, p. 62; Carstares, p. 51.)

Since the king was persuaded not to disclaim what had been done, he admitted it only by way of experiment, so that if the apprehended evils followed, the Legislature would be again called upon to consider the subject. This was not done in the busy reign of King William, nor till 1712. One cause of dissatisfaction is said to have been, that neither the people nor the heritors had benefited by the change; for by the power of naming elders of their own views, sufficient to outvote the heritors, it was complained that the nomination was in fact again in the hands of the Church (Carstares, p. 799), and when it appeared that only in three instances throughout Scotland (Connell on Parishes, p. 469) heritors, under these circumstances, had thought the permanent right worth acquiring at the expense of L.33 : 6 : 8, there were far better reasons for the statesmen in Queen Anne's time reviving the ancient rights of patrons, than the strange notion that this could be part of a plan to exclude the Hanoverian succession. And although this absurd cry was raised and pressed upon the notice of the ministry, more especially after the year 1715, they were too wise to adopt any such views, seeing the security alike to the State and the Church, from this bond of attachment, which allied together the affections as well as the interests of these otherwise independent powers, and which probably alone has for so long a period prevented a collision which would be alike injurious to both.

We have already seen the effect which was given to this supposed fundamental law of the Church during the first century after the Reformation, so that even when the State, by the act 1649, authorised it, the effect now claimed for it was not given by the Church. We hear no more of it for above half a century, till 1715, when efforts were made to obtain a repeal of the act of

Queen Anne, the practice all along being adverse to it. Then comes a renewal of the declaration in 1736, that "it is and has been since the Reformation the principle of this Church, that no minister shall be intruded into any parish contrary to the will of the congregation." (Acts of Assembly, 1736, p. 33.)

But did this, even yet, in the opinion of the Church, imply that the people were entitled to have either voice or *veto* in the appointment of a minister? Just four years after this the settlement of Currie came before the Assembly. Mr Mercer's presentation was unpopular and opposed. He was set aside, the Assembly having the undoubted right to refuse to transport him from his parish of Aberdalgie, as they had also done in 1735 when presented to the parish of Dron; and this they could do either on the ground of usefulness and acceptableness where he is already settled as minister, or on account of "the difficulties which attend his call" or invitation to his new parish. But if the declaration 1736 imported that the people had the right now contended for, as the Assembly wished to allay the ferment in the parish by a healing measure, and recommended that the patron should give a leet of six to the parish to choose one as their pastor, would not the recommendation have been to offer this leet to the congregation at large, or at least to the male heads of families? but instead of this, they propose the leet to be to the *heritors and elders*, thus giving "the people exactly the same place" and the same power in the appointment "which the language of the Church" as well as its practice, "both in early and later times, uniformly assigned to them."

Accordingly, Sir Henry Moncreiff has remarked, as to the declaration by the Assembly 1736 (Account of the Constitution of the Church of Scotland, p. 59), "that this act could not have done more than soothe the discontent of the people by conciliatory language, unless more was attempted than perhaps was practicable, and unless the act had been followed up by a train of authoritative decisions, *which was far from being intended*." Now, why was more not practicable in the opinion of this most able expounder of Church law? Clearly because it was held, and that he held it to be, *ultra vires* of the Church? And why did the Church not intend to follow up the declaration by authoritative decisions? For no other reason surely than this, that this principle truly never carried the right of the people higher than to object to a patron's presentation or a presbytery's nomination, or the heritors' and elders' election; and that to decide otherwise would have been giving it a meaning it never had, either at Geneva or in the Church of Scotland, involving a usurpation of power trenching on civil rights, and therefore unconstitutional. The notable idea had not occurred, what in the debate was well termed the clerical subtilty of that day, nor was legal ingenuity ready to support it, that a dissent

without cause shewn, might be dovetailed into a call or invitation to be pastor, and made a part of it ; so that if a call, where a presentation had already been given, could be by any reasoning considered a requisite step in the constitution of the spiritual relation between pastor and flock ; it, with the power of the people to dissent in its bosom, might be held to fall under the cognisance of the ecclesiastical tribunal, and may be withdrawn from the control of the civil courts.

The act is said to be anent Calls, but surely if it had been said to be anent Patronage, it would have been a much more accurate description of it. It is neither more nor less than a restriction upon the patron's right. It is said to be the initiatory step in the constitution of the pastoral relation. A presentation is just as truly the initiatory step as a call by the people ; and the same argument might warrant the Church by an internal regulation to do away with patronage entirely. Election is the first step in the outward call, and this would embrace elections by the patron, as well as by the elders, or the presbytery, or the people, and but for the statutes securing the rights of patrons, the Church might have assumed jurisdiction over it on this ground.

There is only one other occurrence regarding this matter I wish to notice, to which I have already twice alluded, and which I think strongly corroborates the view I have taken, that the full effect of the Act 1834 gives an entirely new meaning to the declaration. Hitherto the conduct of the Church has only been observed enforcing the settlement of a presentee, with a small concurrence from the parish, altering the sentences of the inferior church courts, and ordaining them to admit him into the benefice ; and, of course, with no other effect on the inferior judicatory than the implied censure by the alteration of their sentence. But in 1752 the Presbytery of Dunfermline having been required by the Assembly to admit Mr Richardson to be minister at Inverkeithing, who had but a small concurrence to his call, six of the Presbytery declined to attend. They were summoned to the bar of the Assembly, where they appeared (22d May 1752), and gave in a representation founding on and embodying at length the above declaration of 25th May 1736, adding that they are "in this unhappy dilemma, either of coming "under the imputation of disobedience to a *particular* order of "our ecclesiastical superiors, or contributing our part to the establishment of measures, which we can neither reconcile with the "declared principles nor with the true interests of the Church." Now if the Assembly, of which Dr Cuming was Moderator, had been conscious that the principle as declared by them, and so strongly founded on by the accused, as if not justifying at least alleviating their offence of disobedience, really imported that a majority of the people must concur, this appeal should have saved

the remonstrants from any very severe penalty. But what was the result? A vote of the Assembly, that its authority should be asserted by the deposition of one of the six, was carried by 93 to 65 votes. (Scots Magazine for 1752, p. 265.) And accordingly, Mr Gillespie, minister of Carnock, was selected as the scape-goat, and actually deposed from the office of the ministry (Acts of Assembly, 1752, p. 7,) for demurring to act against what is now said to be, and to have been since the Reformation, the principle of the Church. If such was the case, I cannot conceive any thing more iniquitous than such a sentence. This proceeding, so serious in its consequences to one of their number, who was acting on conscientious motives, and in accordance with, as it is now asserted, a fundamental law of the Church, can be justified only by the declaration referred to having a recognised meaning, which warranted the appointment of the Assembly to settle Mr Richardson, without the concurrence of a majority of the people, and therefore involving those who demurred in the penalty of disobedience—a meaning totally incompatible with the *veto* being now engrafted upon it, under the pretence of giving it full effect.

The result, then, of this review of the history of the Church of Scotland is, that during eleven years the election of ministers was by the elders of each congregation,—during twenty-two years by the heritors and elders,—and during all the other of the 274 years by the patron; never by the people, not even the control of a *veto*. During the first of these periods the election is to be intimated to the people for their acquiescence and consent, and if the major part of the congregation dissent the presbytery is to judge if the same be on causeless prejudices or not: during the second of these periods, the person named is to be proposed to the whole congregation to be approven or disapproven, and if they disapprove they are to give in their reasons to be cognosed by the presbytery. But this intimation of the election to the people, or proposal of the person called, for their approbation or disapprobation, was not introduced by the authority of the Church, but of the State: the one by the act 1649, and the other by the act 1690. They rested on these statutes, and derived authority alone from them. Because these regulations could not stand with patronage, and patronage must first be abolished; which could only be by the State. When patrons were restored to their rights, these incompatible interests ceased. The first statute was rescinded, and the other repealed. They were inconsistent with the rights of patrons, and accordingly subsisted only during the abolition of patronage. And it would be singular if the Church, which never attempted of its own authority, even when most paramount, and when patronage existed not, to call for the interference of the people till invited by the service of the edict, should now have the power, and should

have had it all along, to legalise not properly a call by the people, but a power of dissent without assigning any reason, virtually nullifying patronage, although patronage be re-established by law.

During the time that patronage has existed in the Church of Scotland, and more especially of late years, owing to the increasing liberality of the times, it has been directly checked by civil and ecclesiastical regulations, and indirectly yet powerfully controlled by public opinion : these may not make the system either speculatively or practically perfect (and it is surely difficult to say what should be substituted in its room less liable to abuse), but at least they prevent abuses upon all essential points, and go far to insure a judicious and acceptable appointment. During all this long period the rights of the people have been uniform, none could be proposed to them as their minister till he had been pronounced qualified for the work of an Evangelist by the Church to which they belong ; and even then they may obtain his rejection, if they shall discover either in his preaching any thing contrary to the doctrines they, as members of the Church, revere ; or in his character, any thing contrary to the essential purity with which these doctrines should be adorned. (Observations on Patronage and Calls, 1833, pp. 16 and 42.) During all this time the people have had the benefit of this fundamental law, as proposed in the Second Book of Discipline, except that the choice of their minister has not been in the presbytery, but in the patron ; the full effect intended for them by the reformers of that day they have always had : but if the declaration implied, that the people were to have any farther interference, and the power, without assigning relevant objections, to forbid the presentee being admitted to his trials by the presbytery, it cannot be competent for the Church of their own authority to make such a regulation now, since the patronage is not in their own hands, as they proposed should be the case at the time the declaration was made, but has been secured to lay patrons by so many enactments of the legislature.

Satisfied that I should be anticipated, with regard to the legal effect of the statutes and the import of the decisions bearing upon this question, by those of the Court who were to precede me in giving their opinions, I willingly left that branch of the discussion in their hands, and have confined myself to a historical inquiry into the practice of the Church as illustrating the subject of patronage and calls. I adopt the reasoning of my Brethren who have preceded me on the legal points of the case, and conclude with stating, that, as to the declaratory conclusions against the Presbytery, I am for repelling the defences, and decerning and declaring in favour of the pursuers.

Friday, March 2.

THE LORD PRESIDENT.—“ LORD COREHOUSE.”

LORD COREHOUSE.—MY LORD PRESIDENT,—I deeply regret that a question should have occurred which is said to threaten a collision between the Ecclesiastical and the Civil Courts, more especially as it relates to a subject which for so long a period agitated the country, and disturbed and distracted the Church. But since it has occurred, and we are required and bound to judge upon it, our duty is plain: On the one hand, we must lay out of view all considerations with regard to the expediency or in-expediency of the law of patronage; whether it is consistent or inconsistent with the Presbyterian system of Church Government; and whether it ought to be abolished, restricted, modified, or allowed to remain as it is. We must lay out of view all considerations whether the Act of Assembly 1834 is wise or prudent, or discreet, and whether, if enforced, it would tend to the edification of the people, and the efficiency of the Church. These are matters for the Legislature, and not for us. It is a judicial question with which we have to deal, and in a judicial light alone I shall attempt to consider it. My learned friend, the Solicitor-General told us, that neither he nor we had any right here to appreciate the merits of the Act of Assembly 1834; and he told us so correctly. But in laying down that position, he was scarcely entitled in the very same breath to assume, or even to insinuate, that all the objections to the wisdom and utility of that act are frivolous and shallow. Whether they are or not, I shall not inquire; we have nothing to do with them at present. But, on the other hand, we have just as little to do with the consequences of our judgment. My learned friend held up a frightful picture of the excitement and dissension which may ensue if we decide against his clients; and the danger of a new and deplorable schism in the Church. That consideration may induce us to bestow more than ordinary care and attention in forming our opinion, and to feel more than ordinary solicitude that it should be well founded; but further than this it ought not, and I am sure it will not, have the slightest effect upon the judgment of your Lord-

ships. We are bound to do justice, whatever may be the result. But though our decision should be unfavourable to the defenders, I rely on the good sense and moderation of the people of Scotland, more enlightened than in former times, and I rely on the wisdom of the Church, its attachment to the constitution, and veneration for the law,—qualities for which it has been long distinguished, and for which I hope it is still distinguished, that these gloomy anticipations will not be realized.

There are two material questions in the cause.

I. Have the patron of the parish of Auchterarder and his presentee, or has either of them, sustained a civil injury, in consequence of the proceedings of the presbytery under the Act of Assembly 1834?

II. If that question be answered in the affirmative, is it competent for this Court to afford them, or either of them, redress?

With regard to some subordinate points, as to the shape of the Summons, and the parties called as defenders, I shall have little to say.

In considering the first question, there are two postulates which I assume without argument. 1. That patronage is a *civil right*. By patronage I mean the right of presenting a person, who, if he be qualified in the judgment of the Church, is entitled to be admitted to the benefice, and that independent of all the accessories of patronage, as a right to free teinds, vacant stipend, a seat in the church, and a burial-place there. The right of presenting alone, which affords honour and influence, and the privilege of performing an important duty, is prized on that account, and is the subject of commerce, I believe, in every Protestant country. It passes, or may pass with us by infestment, it may be disposed gratuitously, or for a price; it may be impignorated, adjudged, evicted, or escheated.

2. I assume that, by the act 10th of Anne, cap. 12, patronage is the law of the land, and the law of the Established Church of Scotland, and it cannot be abrogated, altered, or in any shape impaired by any authority, ecclesiastical or civil, the British Legislature excepted.

With these postulates I proceed to the first question. Before inquiring whether it was or was not in the power of the Church to pass the Act of Assembly 1834, let us consider what is the effect of that act on the right of presentation. There is no doubt as to this matter—there is no attempt on the part of the defenders to conceal or disguise its effect. Every person presented to the benefice by the patron may, in virtue of this act, be rejected at the good will and pleasure of a majority of the male heads of families in the parish, being communicants, without any reason whatever being assigned. That majority may say to the patron, unless you present the individual whom we choose you

shall not present at all, that is, you shall not present with effect. Consequently the exercise of the right of presentation may be defeated in any case at the will of a third party. Now what is the nature of a right, the exercise of which is at all times absolutely defeasible? In the eye of law such a right, at least when vested in a person *sui juris*, must necessarily be either a joint right, or a right by sufferance,—I know of no other alternative. In the case of a joint right the maxim of law is, *in re communi melior est conditio prohibentis*, that is, either party may prevent the other from acting. Of this there was an example in joint patronages in the early ages of the Christian Church. When joint patrons could not agree in nominating the same person, the bishop or ordinary is directed by the old canons to proceed to the church, to remove the relics, to lock the doors, and to keep the key in his pocket until the patrons are of one mind. But this regulation did not continue long; the ordinary in those circumstances took it upon himself, first to choose between the presentees, and by a second stride to present any person he thought fit without regard to the choice of the patrons. In the Protestant Church there is a more equitable rule; the patrons are allowed to present *per vices*. It is not alleged by the defenders that, under the act 1834, the party having the civil right of patronage and the heads of families are joint patrons, otherwise by our statute 1617 they would present by turns, the one having no control over the other.

Under this act 1834, therefore, I conceive the other alternative must be adopted, that is, the patron's right must be reduced to a sufferance. It is virtually a right of the same nature as that which I have to walk over my neighbour's grounds if he consent that I should do so, to fish in his ponds, to shoot in his preserves, to cut his woods, and so forth, all of which I am entitled to do provided he gives me leave. In common speech this is often called a right, but in reality it is no right at all. It is of the same nature with the *precarium* of the civil and canon law.

But by the 10th of Anne, the right given to the patron is subject to one condition only, namely, that the presentee shall be qualified, a matter for the judgment of the Church Courts alone; *quoad ultra*, it is absolute. The statute provides, "that it shall be lawful for her Majesty, and any person having a right to any patronage, to present a qualified minister, *whom the presbytery shall, and is hereby obliged to receive and admit.*" A clause follows with regard to the *manner* of admission, the import of which I shall afterwards consider.

Then on what grounds is it contended by the defenders that the General Assembly had power to convert this absolute right into a right by sufferance only?

I. They say it is a fundamental principle in the polity of the Presbyterian Church, that no person shall be admitted to the office of the ministry *contrary to the will of the congregation*, and consequently, that no presentation can be made effectual if the people refuse their consent. If they refuse, and the induction proceeds, we are told it is *violent intrusion*, which is to be eschewed. In support of this position the Books of Discipline, Directories, and other works called the standards of the Church, with various Acts of Assembly referring to them, are cited as authorities. That the maxim is so stated in general terms in those authorities is true, but it is necessary to inquire what is the precise import of this maxim.

It does not occur for the first time in the writings of the Reformers. It was a fundamental principle in the Christian church for more than a thousand years before Luther, or Calvin, or Knox was born. In those early ages, though patronage was not unknown, a very great proportion of benefices were elective, and not donative. The minister was chosen by the clergy, but he was chosen with the consent, or with the concurrence of the people. Thus the rubric of a canon in 428 is in these words : *Plebis non est elegere sed electioni consentire*. Again in 493 : *In electione Episcopi populus debet adesse*.

The Pontifical says, " it was wisely appointed by the fathers " of the Church that the people should be consulted in the choice " of those who are to minister at the altar." And in Cyprian's letter to the people of Spain, it is said, " no one should be ordained, but in the presence of the people, that the demerits " of the bad may be disclosed, and the merits of the good proclaimed." (Van Espen. II., T. 9, c. 9)

A great number of texts to the same effect might be cited from the canon law and the works of the fathers, were it necessary to enlarge upon a point so well known.

But after it was settled that the consent of the people is to be asked at the admission and ordination of a bishop or other minister, the question arose, as it necessarily must arise in such circumstances,—What if the people refuse to consent, does that defeat the nomination, or does it not ? This question was answered as early as 493. Gelasius, the Pontiff at that time, states, that he was informed that a benefice had been long vacant, and that very few, and those of the meanest class, would concur in the election of the person who had been approved of by the Church. Therefore, he puts the clergy in mind that it is their duty to compel all the people, by assiduous admonition, to give their consent (1. Dec. Dist. 63.) This certainly means that it was the province of the clergy, who had the right of nomination at that time, to inquire

into the objections of the people ; and if they were ill-founded, to remove them by such arguments or admonitions as would carry conviction to the mind.

The same thing is laid down at a later period, still more explicitly. The Pontiff Stephanus, in 886, writes, that he had heard that a certain bishop was dead, and that great dissensions had arisen with regard to the appointment of his successor. " I am not surprised," says he, " at this, because it happens so frequently, men seeking their own, and not the things of Jesus Christ. Therefore," he adds, " the greatest care must be taken that the clergy and people being convened, a person may be chosen against whom no canonical objection lies. The election belongs to the priesthood, and the consent of the people is to be adhibited. The people are to be taught, but not obeyed. *Docendus est populus, non sequendus.*" (1. Dec. Dist. 63.) This maxim is repeated again and again in the early authorities of that church.

It is, or at least was, unquestionably the doctrine of the canon law, that the consent of the people is to be required at the admission of a minister, and that they are entitled to object, under the proviso, however, that their objections are well-founded. You have thus both the maxim and its limitation, or rather you have the maxim construed in a sound and reasonable sense. No person is to be intruded contrary to the will of the people, but it is not the *nuda voluntas*, the *merum arbitrium* of the people. It is will, as defined by Cicero after the Stoics, *voluntas est quæ quid cum RATIONE desiderat; quæ autem adversus rationem incitata est, ea cupiditas effrenata, quæ in omnibus stultis invenitur.* (Tuscul.) It is the will of the people proceeding upon reasonable grounds, that is, grounds which can be stated and proved.

I make no apology for referring to the canon law; for Lord Stair has told us, (I. i. 14,) " that so deep has this canon law been rooted, that even where the Pope's authority is rejected, yet consideration must be had to those laws, not only as those by which Church benefices have been erected and ordered, but as like-wise containing many equitable and profitable laws, which because of their weighty matter, and their being once received, may be more fitly retained than rejected. And to that effect also it is recognized in our Confession of Faith."

But if the maxim with regard to intrusion is thus limited in the canon law, let us see under what form it has been received in the Protestant Churches. That subject was so fully discussed by Lord Medwyn yesterday, that I am saved the trouble of entering upon it. I shall quote only one authority as the general summary of what he stated to your Lordships.

Boehmer, in his excellent digest of the ecclesiastical law of the

Protestants, when treating of the law of patronage, prefixes this rubric to the 77th section of that title; "Haberunt etiam parochiani votum negativum." The parishioners have a negative voice in the settlement; and in the text he says, "the parishioners must not be excluded, over whom the presentee is to be placed. They are entitled to a negative voice, *saving the right of presentation, which belongs to the patron alone.*" He continues, "It is undoubtedly for the interest of the Church, that none but a qualified person be admitted, one against whom no objection lies. Therefore, the parishioners are to be heard; and before the candidate is presented to the bishop for ordination, he shall preach a trial sermon in the principal church, after which the superintendent shall take the opinion of the parishioners, as to his life and conduct, and if any objections are made, or fault found with him, this is to be reported to the consistory, who are to judge of the matter." And he proceeds thus, "The negative voice which belongs to the congregation and superintendent operates in this manner, the want of ability in the presentee being proved, and the other defects which may have been laid to his charge being demonstrated, he is to be rejected, and the patron enjoined to present a fitter person." (Jus. Eccles. Prot. III. 28. § 77, 78.)

The same thing is laid down as explicitly in another work of this author, entitled, *Jus Parochiale*. The rubric is *Plebi competit votum negativum*, and in the text, "*Universally in the law of patronage, the consent of the people is not excluded, but so that the patron shall have the decisive, and the people a negative voice, that is, they may dissent, but only, however, if they can allege just reasons of dissent.*" *Equidem in omni jure patronatus non quidem excluditur consensus populi, sed ita, ut patrono votum decisum in electione tribuatur, populo negativum ut possint dissentire; non tamen aliter quam si justas, dissensus causas allegare queant.*" (Jus. Paroch. iii. 1, 18.)

We are now prepared to inquire in what manner this maxim is construed in our own church, whether it is taken in the same sense as in the canon law, and in that of the Protestant churches generally, or in a sense altogether different, namely, that the mere will of the congregation, their dissent without any cause shown, is sufficient for the rejection of the presentee. The maxim itself is laid down in broad and general terms in the Fourth Chapter of the First Book of Discipline. "The admission of ministers to their offices must consist in the consent of the people and Church whereto they shall be appointed, and approbation of the learned ministers appointed for their examination." There is no limitation here, nor was there any room for limitation, for according to Knox's scheme in that book, the

right of election, in the first instance, was vested in the congregation. They had the initiative. It was theirs to nominate, not to consent to the nomination of another party.

But by the same book, if the congregation failed to elect for the space of forty days, the right to present accrued to the church, of the superintendent and his council, who were to examine the person of their own selection, and to direct him to the congregation where he should serve. "That there in open audience of his flock, in diverse public sermons, he may give confession of his faith," &c. "If his doctrine is wholesome, and if there is nothing reprehensible in his life, doctrine, or utterance, then we judge the church, (congregation,) which before was destitute, unreasonable if they refuse him whom the Church did offer; and that they should be compelled, by the censure of the Council and Church, to receive the person appointed and approved by the judgment of the godly and learned."

The instant, therefore, that the right to present passes into the hands of a third party, not only the maxim but its necessary limitation appears. The presentee is to preach before the congregation, that they may have an opportunity to state and prove any good objection to his life, his doctrine, or his utterance; but if there be none, the congregation *is to be compelled to receive him*. And the Father of our Reformation, while he states in the same chapter that violent intrusion is to be avoided, explicitly declares, "violent intrusion we call not, when the council of the Church, in the feare of God, and for the salvation of the people, offereth unto them a sufficient man to instruct them, whom they shall not be forced to admit before just examination."

It is amusing to observe, that Knox uses here the very same words that Pope Gelasius did one thousand years before. They both say that the congregation shall be compelled to consent or to receive the presentee. But the compulsitor of the Pope is more gentle; it is to be accomplished by assiduous admonition; while our stern Reformer orders that the consent shall be extorted by the censures of the Church, and at that time, when excommunication was equivalent to the *aquæ et ignis interdictio* of the Roman law, the censures of the Church were no insignificant penalty.

Let us come next to the Second Book of Discipline in 1587. There again you have the general maxim with regard to the people's consent laid down in unqualified terms. "Election is the chusing out of a person or persons most habil to that office that veakes be the judgment of the eldership and consent of the congregation whereunto the person or persons are to be appointed." I am not aware that there is any restriction of the

rule to be found in this book. But we have the most authentic evidence in 1596 of the sense in which the maxim was taken by the authors of the book, the chief of whom was Andrew Melville. King James put a series of questions to the Church in that year, and one of them regarded this point, "Question 3, "Is nocht the consent of the maist pairt of the flock, and also of "the patron, necessar in the election of the pastors?" Whatever might be the case as to the patron, there could be but one answer as to the consent of the congregation, if the maxim in question is to be taken in an unlimited sense. The answer must have been a simple affirmative, that *the consent of the congregation is necessary*. But that was not the answer actually given. The Church, assembled by its commissioners at St Andrews, and after deliberation for diverse days on the King's questions, returned this answer to the third question: "The electioun of "pastors sould be maid be tham wha are pastors and doctors "lawfullie called, and wha can try the giftes necessariie belang- "ing to pastors be the Word of God, and to sic as ar chosine "the flok and patron sould giff their consent and protectioun." When the Church has chosen and approved of a man, which of course they would not do if any relevant objection was stated and verified, then it becomes the duty of the congregation to give their consent, as it is the duty of the patron to give his protection; and if further explanation had been required, I make no doubt that Andrew Melville would have said in the words of his great predecessor, that they should be compelled to consent by the censures of the Church.

If we read the act 1592, which is called the great Charter of Presbytery, we find no trace of the doctrine, that the dissent of the congregation without reasonable cause is sufficient to defeat the patron's presentation. Patronage, which from the date of the Reformation had been the law of the Church, was ratified by that act, contrary to the wishes of the authors of the Second Book of Discipline. And while it reserves the right of collation to presbyteries, it provides that they shall "be bound and astricted to receive "and admit quhatsumever qualified minister presented be his "Majesty or laick patrons." If the congregation had any reasonable objection, they had an opportunity of stating it to the presbytery when exercising the duty of collation. But there is no recognition of any power in the people to stop collation by the simple interposition of their *veto*.

This point was mooted in the General Assembly of Westminster in 1644, but at that time it was not decided. "Some debate," says Gillespie, "was of the people's consent, which was "waived." The Directory said, "If there be no impediment objected against him who is to be admitted, but the people's con-

"sent to his admission." Mr Lee said, "*Datur tertium*, perhaps the people can object no cause to the contrary, yet not consent, what shall be done in that case?" Mr Marshall said, "It is not fitt now to debate such point." But where was the occasion or possibility of debate if it had been a fundamental law of the Church from the Reformation, that the dissent of the majority of the congregation alone, and without cause shown, is a bar to the admission of a minister?

The point which was waived by the Assembly in 1644 was decided in 1649. In that year the Convention of Estates wished to vest the right of election in the people according to the First Book of Discipline. But the General Assembly, to whom the matter was remitted, thought otherwise, and gave the right to the kirk-session, the lowest ecclesiastical court. The person so chosen was presented to the congregation, who were called upon to approve or disapprove. If the majority approved, the presbytery proceeded to collate, unless the minority stated and verified relevant objections. If the majority disapproved, the matter was brought into the presbytery, and if the presbytery did not find their dissent to be founded upon causeless prejudice, they proceeded to a new election.

The distinction here between the majority and minority is plain and reasonable. If the majority assented, there was at least a *prima facie* case in favour of the person elected. There could be no "*fama publica clamosa et frequens*" against him, and, therefore, there was no reason to stay the admission, unless some objection was stated and proved. On the contrary, if the majority dissented, there was *prima facie* evidence the other way, and the admission was stayed until the presbytery had an opportunity of judging upon all the circumstances of the case. There is nothing in this act to countenance the opinion, that the *mera voluntas* of the majority was sufficient to defeat the election. If so, there was no need to bring the matter before the presbytery, and no possibility of their judging whether the dissent was grounded on causeless prejudices or not. The distinction was reasonable, because otherwise a few individuals, or one individual, might have stopped proceedings in any case. But the assumption, that objections would be listened to if urged by the majority, which would be disregarded if they came from the minority, or objections which were neither relevant nor verified, might be sufficient to reject the nominee, or that the will of the majority, without any reason at all being assigned, would defeat the election, appears to me not only gratuitous, but in manifest contradiction both to the spirit and words of the act. I do not think, either in the case of the majority or minority, that the objections were required to be such as might be the ground of a libel before the presbytery, as immorality,

unsoundness of doctrine, and so forth. But every other known objection, either in the canon law or our own, and they are nearly identical, to the fitness, or idoniety, as it is called by the canonists, of the individual for the office would be enough ; for example, in Scotland, that he did not understand the Gaelic language, or the dialect of it spoken in the district—that he had too weak a voice for the size of the church—too feeble a frame to do the duty of a Highland parish of forty miles in length, or a Lowland parish containing 20,000 inhabitants. As to that matter, I conceive the majority and minority were *in pari casu*. This is the construction I put upon the Act of Assembly 1649, and which the logic of my friends has not been able to shake.

By the act 1690, the heritors and elders have the right of presentation, and there again the dissent of the people is respected, but not without cause shown. It is enacted, “ that they “ (the heritors and elders) name and propose the person to the “ whole congregation, to be either approved or disapproved by “ them ; and if they disapprove, that the disapprovers *give in* “ *their reasons*, to the effect the affair may be cognosced upon “ by the presbytery of the bounds.”

After a careful review of the standards of the Church, the acts of Parliament, and the acts of Assembly, I see no evidence that the maxim with regard to violent intrusion, or the necessity of the people's consent, was ever understood in a different sense in Scotland from that in which it was employed in the canon law, and in the ecclesiastical law of other Protestant countries. The congregation is always to be consulted, and no one is to be intruded in the face of their dissent, *provided it be founded on good reasons*.

But, before the act 1834, this was uniformly the practice of the Church, which gives the people a right of objecting to the presentee ; *1st*, when the call is moderated ; *2d*, by allowing them to present a libel at any time during the course of his trials, charging him with immorality of conduct or unsoundness of doctrine ; and, *3dly*, after his trials are finished, when, by the service of the edict, all who have any objections are invited to state them without the formality of a libel, though a libel should be incompetent. The voice of the people, therefore, was always heard ; and their reasons of dissent, if they had any reasons of dissent, were judged of by the presbytery.

It does not appear to me, therefore, that the maxim against violent intrusion, when rightly construed, can be of any avail to the defenders.

But, in the *second* place, they rely on the usage with regard to Calls, and the act of Assembly 1782, in which it is declared,

“ That the moderation of a Call in the settlement of ministers
 “ is agreeable to the immemorial and constitutional practice of
 “ the Church, and ought to be continued.”

Upon this point, it will be observed that the term *CALL* has two significations, and that ambiguity has given rise to endless disputes. A Call is defined in the First Book of Discipline thus : “ Ordinarie vocation consisteth in election, examination, and admission.” It is granted on all sides, that examination and admission belong to the Church exclusively ; the other fraction, namely election, is declared by the same Book of Discipline to appertain to the people. If that had been received as law, which it never was, the Call on the part of the people would have been synonymous with a nomination. And it will be observed, that the term Call was long construed in that sense by a considerable party, both in the Church and among the people. It is so construed at present, I believe, by all the Seceders, and many members of the Establishment.

But the term *Call* has another and a very different signification. It is used to denote the *literæ vocationis* in the language of the continental Protestants, which are sent to the presentee by the people after he has received a nomination from the patron. In the passage from Boehmer which I have already quoted, it appears that the proceeding in the Saxon churches is exactly similar in that respect to our own. In that sense the Call is not an election by the people, as we have already seen, but an invitation, for the right to nominate is lodged elsewhere. It is manifest that the term must have been used in this sense even in the First Book of Discipline, and under the act of 1592. It was so used after Episcopacy was re-established, when the practice of moderating in a Call, in some instances, was continued, although the Privy-Council at that time was empowered to grant warrant for letters of horning against the Ordinary if he refused to admit the presentee. I conceive it was so construed under the act 1690, and that it must be so construed now under the act 10 of Anne.

Those who adhered to the other meaning of the term Call, whether they maintained the divine right of the people to choose their ministers, or, what amounts at least in effect to nearly the same thing, that the consent of the congregation is indispensable to constitute the pastoral relation, never dissembled that their doctrine is inconsistent with the law of patronage, which they held up as inconsistent with the standards of the Church, unscriptural and unconstitutional ;—on the contrary, they often distinctly announced that a Call in their sense of the term was subversive of patronage. As early as 1596, some presbyteries refused to take a man on trials if he had accepted a presentation, and before induction obliged him to sign a declaration, that he imput-

ed his call to the people alone. After the act 10 of Anne was passed, similar proceedings took place. We are told,—“for a great number of years, presbyteries refused to receive a presentation unless the presentee in his acceptance expressed a number of conditions, such as that patronage was contrary to the principles of the Church of Scotland, and that he would not prosecute his claim without having the Call of the people, that he submitted himself and his presentation entirely to the presbytery,” and so forth. At that period preachers were often deprived of their license, and it is believed ministers suspended, if not deposed, on no ground but because they had presumed to accept presentations, or refused to repudiate the law of patronage. It was the common practice for presbyteries to moderate in calls in the teeth of the patron's presentation, and to induct in opposition to it. The truth is, that for several years after 1712 the act 10th of Anne was in abeyance; the Crown did not choose, and the patrons did not venture, to present in the excited state of the country. And really one cannot help sympathizing with the feelings which caused that excitement. The statute was, or at least was represented to be, a new attempt to force Episcopacy upon Scotland; and many were then alive who remembered the tyrannical measures employed with that view before the Revolution, and the savage barbarity with which they were enforced. But whatever excuse the people and clergy may have had for their conduct, it is in vain to deny that they were then in a state of open and avowed resistance to the law. When the ferment subsided, and the horror of patronage began to abate, other views prevailed, and now for seventy years it has been settled by a *series of adjudged cases* in the Supreme Ecclesiastical Court, that a Call is an invitation which it is desirable that the congregation should give for the encouragement of their pastor, and which by usage they are always asked to give, but which is not part of ordinary vocation, as defined in the First Book of Discipline, or in anywise essential to induction. During the period I have mentioned, numberless cases have occurred in which the Assembly have sanctioned calls signed by two or three individuals, (in short, just such calls as the one which Mr Young obtained at Auchterarder,) although the whole of the parish besides, consisting of hundreds or thousands of persons, refused to subscribe, or even expressly opposed the settlement. And that is the only sense in which I conceive a Call can be reconciled with the existence of a real and efficient right of patronage. Those who understand it in a different sense,—at least those who so understood it in the beginning of the last century, and when the secession took place,—never pretended to reconcile them.

In my humble opinion, therefore, neither the maxim against

violent intrusion, nor the usage with regard to calls, affords any sanction to the Act of Assembly 1834. From the Reformation till the date of that act, I can discover no trace of authority (at least during the subsistence of patronage) for the doctrine, that the dissent of the congregation, or any part of it, without reasons assigned of which the presbytery could judge, was of itself sufficient for the rejection of a presentee, whatever might be his qualifications, and I consider this act, therefore, an unwarrantable innovation; while the avowed but abortive attempt, at the beginning of the last century, to defeat the right of patronage altogether by what is termed a Call, so far from affording countenance to the measure, forms by its failure, and the acquiescence of the Church for so long a period in that failure, a distinct and powerful objection to the proceeding of the Assembly.

But the defenders, giving up the ground, that the act 1834 is a declaratory law, attempt to justify it as a new constitution which the General Assembly, as a legislative body, had power to make. They say that the Church may legislate in spiritual matters without control, that collation is a spiritual matter, and therefore, that the Church may require that the presentee shall be *acceptable* to the people, as the condition of his being inducted. Now in this syllogism the major must be conceded, but as to the minor there is a distinction. In so far as the qualifications of the presentee are in question, collation is a spiritual matter, for of them the Church alone can judge; but in so far as the patron's right is concerned it is a civil matter, and the Church has no power to impose any condition by which that right can in any degree be injured or impaired. The defenders say, that the presbytery are entitled to hold the *acceptableness* of the presentee, as a qualification indispensable to the discharge of the pastoral office. I conceive that *acceptableness* is not a quality in the presentee at all, either absolutely, as connected with the duties of a pastor in general, or relatively, as regards the discharge of those duties in the particular parish to which he is presented. He may be perfectly able for the performance of those duties in the most efficient and edifying way,—he may be peculiarly suited to that congregation, and yet he may be very unacceptable,—perhaps on that very account the more unacceptable. When the apostles first preached at Ephesus they were by no means acceptable; and it was not a majority of the male heads of families there who objected,—we are told that the whole city rose and rushed into the theatre, threatening them with personal violence. If an apostle had preached one hundred years ago in some parishes on the coast of Orkney or Shetland against plundering wrecks, or if he had preached fifty years ago in any one of half

the parishes in the north of Scotland against illicit distillation, he would probably have experienced a similar reception. Paul afterwards became very popular at Ephesus; and we know that many presentees, who were settled in Scotland with the assistance of a troop of dragoons, became useful ministers and obtained the veneration and love of their parishioners. Acceptableness *per se* is a matter not within the province of collation at all, though collators may inquire whether the want of it has arisen from a good and sufficient cause. If they give it any other effect, they delegate to the people the office which was delegated to themselves, or rather, they substitute the people's choice for the choice of the patron.

But the defenders say, that the General Assembly have, from time to time, made regulations with regard to the qualifications of presentees. I believe it will be found on inquiry, that the greater part of those regulations were not only requisite for securing the respectability and usefulness of ministers, but had existed in the canon law for centuries before the Reformation—for example, that the presentee should bring testimonials of character from the place of his residence—certificates of attendance and proficiency from authorized seminaries of education—that he should speak the language of the district where the benefice is situated—that he should not hold pluralities, or engage in business incompatible with his duties. All these are introduced *in terminis* from the canon law. Other conditions, again, which the Assembly have adopted, for example, that he should have been previously licensed, were plainly for the benefit of the patron, as they directed his choice; and a late act, that a license from a foreign presbytery in communion with the Church should not be sufficient, was necessary, because there is often a want of candidates in those places having the knowledge and acquirements which in Scotland were always considered indispensable. But because patrons have acquiesced in some limitations of their right, the propriety and expediency of which were apparent, it does not follow that they should submit to a condition which would defeat their right altogether. That the Act 1834 would often, in practice, have this effect, is indisputable. Considering the weakness of human nature, the innate love of power, antipathy to patronage, personal dislike to individual patrons, causeless prejudice, and prejudices caused by intrigue, party spirit, or the solicitations of interested persons, motives would seldom be wanting to induce a majority of the congregation to reject every person offered, but the one whom they themselves had selected.

Some use has been made in argument of the last clause of the section in the 10th of Anne, already referred to. After declaring that it shall be lawful for her Majesty and other

patrons to present qualified ministers, it provides, "that the presbytery shall be obliged to receive and admit *in the same manner* such qualified person or persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers *presented* before the making of this act ought to have been admitted." I think it is obvious that this provision as to the *manner* of admission is merely a saving of the Church's right of collation; and it will be particularly noticed that admission is to be made in the manner practised, or which ought to have been practised,—not while patronage was in abeyance during the usurpation, or after the act 1690, but while patronage was in force, apparently for the very purpose of avoiding all cavils on the difference of the words to *propose* in the act 1690, and to *present* in the act of the 10th Anne.

On all these grounds I arrive at the conclusion, that the act 1834 is *ultra vires* of the Church. I think it has defeated the right both of the patron and presentee of the parish of Auchterarder. And here one cannot but observe, that while the *veto* is a wall of brass against the patron, it is a web of gossamer against the presbytery. When six months have elapsed, and their *jus devolutum* has accrued, we hear no more of violent intrusion, no more of the people's dissent, no more of acceptableness being an indispensable quality of the presentee; as soon as the presbytery themselves become the patron all this is disregarded; and, indeed, were it not so it might be impossible to supply the vacancy. This consideration of itself appears to me to subvert every ground on which the legality of the Act 1834 has been defended. I am confident, therefore, that your Lordships will see now what John Knox saw when the Reformation was in its cradle, and when he was writing his book of Prospective Ecclesiastical Polity. You will see that a right of presentation in one party is from the nature of the thing practically incompatible, with a right of dissent without cause in another party. If it existed, you must fall back to the old canon. The moderator must proceed to the church, remove the communion plate, the Bible and the gown, lock the door, and keep the key in his pocket till the patron and the people are agreed. And as that plan was found not to answer, the only other alternative is that which the Act 1834 would effect. If it be enforced, whatever may have been the intentions of those who framed it, and I believe their intentions were good—it would operate as an engine to destroy the rights both of the patron and the people, and to vest the sole and unlimited power of presentation in the hands of the Church itself, an effect which, in every point of view, is to be deprecated.

I know of no proceeding of a character similar to that in question except one, to which my Brother Gillies alluded, during the reign

of Henry VIII. in 1533, exactly three hundred years before the interim Act of Assembly was passed. By a charter of King John, when a bishoprick became vacant, the dean and chapter of the cathedral were empowered to elect the successor. In the 25th of Henry VIII. there is a statute expressly acknowledging the right of the dean and chapter; but under this proviso, *1st*, that they shall not proceed to an election until they obtain a license from the King, and *2d*, when they do proceed, that they shall elect the person whom he is pleased to name, and no other. It appears to me that the General Assembly holds patronage only as a license to present, but under the condition that the patron shall have power to present no one but him whom a majority of the male heads of families shall approve. When the 25th of Henry VIII. was repealed by the 1st of Edward VI. it is said, "whereas the said elections (that is under Henry's statute) be in very deed no elections, but only having colours, shadows, or pretences of elections, serving, nevertheless, to no purpose, and seeming also derogatory and prejudicial to the King's prerogative royal." If the Act of Assembly 1834, with regard to presentations, be enforced, it may be said with equal truth, that the said presentations be in very deed no presentations, but only having the colours, shadows, or pretences of presentations, serving, nevertheless, to no purpose, and seeming also derogatory and prejudicial to the patron's right. Indeed, it may be said with more truth, because Henry's statute was of little prejudice to the royal prerogative; but the act 1834 annihilates the patron's right altogether.

II. On the second branch of the case I shall detain your Lordships for a very short time. If a civil wrong has been committed, and I think both the pursuers have sustained a civil wrong by the operation of an unwarrantable and illegal Act, a civil remedy must lie in some court; and I think it must lie in this Court, unless it has been taken away by statute or custom. The defenders found upon the act of Parliament 1567, which vests the jurisdiction with regard to the settlements of ministers in the Ecclesiastical Court. After providing that the presentations of laic patronages shall be reserved to the just and ancient patrons, and that they shall present a *qualified person* within six months, it proceeds thus, if "the said superintendent or commissioner of the kirk refuses to receive and admit the person presented by the patron, as said is, it shall be leisum to the patron to appeal to the superintendent and ministers of that province quhair the benefice lyis, and desire the person presented to be admitted, quhilk if they refuse, to appeal to the General Assembly of the haill realme, be quhome the cause beand decyded, shall

"take end as they decern and declair." In my apprehension this applies to the case, when the patron on the one part, and the superintendent or the commissioner on the other, were at issue with regard to the qualifications of the presentee; as appears manifest from the preceding clause of the statute which was read yesterday. In that case the patron has an appeal from the lower to the higher church courts, because it is a matter of collation, of which the spiritual courts are alone cognizant. I do not think it has any reference to the exercise of a right of presentation as a civil right, which by the canon law had always been reserved to the civil courts.

But supposing that view to be incorrect, the act 1567, as construed by the defenders, has long ago fallen into desuetude. This is clear from the series of decisions cited by the pursuers, beginning with that of Auchtermuchty in 1735, and ending with that of Unst in 1795, in which this Court has tried the legality of presentations when rejected by the presbyteries, has found that the *jus devolutum* had not accrued, because the presbytery had illegally failed to induct, and has deprived the person of the temporalities of the benefice, whom the presbytery had inducted without a legal warrant. Construing the act 1567 as the defenders have done, none of these decisions could have been pronounced.

Then it is said that the Church's independence has been secured by various statutes; and, consequently, its proceedings, whether legislative or judicial, are beyond the cognizance of this Court. But this position is subject to the distinction already noticed. It is laid down in all the standards, from the First Book of Discipline to the Confession of Faith in 1690, "that in all Assemblies diligence should be taken that only ecclesiastical things should be handled in them, and that there be no meddling with any thing pertaining to the civil jurisdiction." But the patron's right pertains to the civil jurisdiction. It is the duty of the Church to render unto God the things that are God's; it is our duty to render unto Cæsar the things that are Cæsar's.

I do not think that it is difficult to draw the line of distinction between the province of the ecclesiastical and that of the civil courts. Vocation, in the language of Knox, consists of election, examination, and admission. For election, *presentation* must now be substituted, as the right to nominate is not in the people but in the patron. It is for the civil court to judge in what relates to the first part of vocation;—for example, who has the right of patronage, in what form, and within what time a presentation is to be given,—how it is to be carried into effect, and in what manner unwarrantable attempts to frustrate it are to be

counteracted. On the other hand, *examination* belongs exclusively to the ecclesiastical courts. It is for them to judge of the character and qualifications of the presentee. *Admission* is likewise an ecclesiastical matter. A civil court can neither confer the sacred character which ordination impresses, nor obliterate that character when it has been impressed. So also, a civil court can neither create the pastoral relation between the presentee and the parish, nor dissolve it when it has been created.

On the same principle all spiritual functions are under the control of the Church, while the temporalities of the benefice fall under the cognizance of the civil power.

It is from overlooking this distinction that difficulties have arisen, both as to the cases in which it is competent for this Court to interfere, and the nature of the redress which it has power to give. For example, if there is a competition for the right of patronage, it is for us exclusively to try the question between the competitors. If, pending that competition, both parties issue presentations, and the presbytery proceeds to induct on the wrong presentation, this Court cannot review the sentence in an advocacy, nor suspend the spiritual relation between the person inducted and the flock in a suspension, nor set aside the proceedings in an action of reduction. But, on the other hand, we can find in a declarator that the right of the true patron has been wrongfully defeated, and in consequence we can suspend a charge for the stipend at the instance of the person inducted, or we can find the patron entitled to the vacant stipend, (suppose the act 54 Geo. III. to be out of the question, of which I shall afterwards speak.) These points were keenly contested in the cases of Culross and Lanark, but established by the decisions in both, and this, I think, is not now disputed by the defenders. On the same principle, I conceive, we can sequester the manse and glebe, or find the heritors entitled to dispose of the rents and profits of them to pious uses, until the right presentee is inducted. In like manner, though there is no competition for the patronage, if the presbytery induct in prejudice of the right of the undoubted patron by virtue of a supposed *jus devolutum*, or of a general call, the same redress can be given. This was the case in Auchtermuchty and Unst.

Suppose the presbytery shall defeat the right of the patron, not by inducting in prejudice of his presentation, but by refusing to proceed under it, this Court may resort to similar measures after establishing the wrong by decree of declarator against the presbytery. We can find that the *jus devolutum* cannot accrue until the presbytery have taken trial of the qualifications of the presentee. This was decided in the case of Dunse by a judgment of the Court of Session, not touched by that which was

pronounced by the House of Lords. But further, notwithstanding an observation in Lord Monboddo's report, which is not confirmed by that of Falconer, I think it is clear that the patron may be found entitled to the vacant stipend, and the heritors to the profits of the manse and glebe, till the presbytery proceed. The presbytery is the proper contradictor in that action, because during a vacancy, they have a title and interest to defend the benefice from dilapidation.

It is true that, in consequence of the act 54 Geo. III. the Collectors of the Widows' Fund also must now be called to try a new and very important question, whether, on a fair construction of that statute, the Church is entitled to apply to their own patrimonial benefit, stipends arising during a vacancy occasioned by their own illegal conduct. If that be decided in the negative, the presbytery are not only a proper contradictor, but the only proper contradictor.

All these points, in so far as the competency of this action is concerned, I humbly conceive, have been clearly settled by a *series rerum judicatarum*. But there are other points which have not been decided, and which, before the Act 1834, could not arise for judgment in this Court.

In this case the presbytery have not merely delayed to act on the presentation, but they have rejected the presentee, not in the exercise of their judicial functions, but in the exercise of a ministerial function, giving obedience to the unwarrantable act of the Assembly, by which they are prohibited to take on trial a presentee *vetoed* by the male heads of families. Now granting that your Lordships can neither rescind the Act 1834, because the Church is independent both as a legislative and a judicial body, or even granting, which is more doubtful, that you cannot decern the presbytery to proceed to trial, it is clear, at least, in my judgment, that you can make the presbytery responsible for all the civil and patrimonial consequences arising from their illegal conduct in the exercise of their ministerial function. To put a case. The Court of Exchequer is a supreme court, and as independent of us as the Ecclesiastical Courts are. Suppose my learned brother on the other side of the Bench, sitting as Baron of Exchequer, should make an order on the Presenter of Signatures, that he shall present no signature for revisal containing the grant of a patronage unless it be accompanied with a bond from the grantee, that he will never interfere with the settlement of a minister, but allow the benefice to be always filled by virtue of a popular call alone. I do not think your Lordships could rescind that order, or decern Sir James Montgomery to present signatures without such a bond. But, if he refused to present a signature in obedience to the Baron's order, and in conse-

quence a Crown Charter could not pass the seals, nor infestment be expedited, and if the estate was carried off by the creditors of the former proprietor, would you, sitting here, or in the Jury Court, hesitate to sustain an action of damages against the presentee? So again we are as independent of the Court of Justiciary as the Ecclesiastical Courts are of us. But you will recollect that, on the 6th July 1692, when different notions prevailed both of the principles of political economy and the powers of this Court, your predecessors made an Act of Sederunt, ordering that no French wine should be sold in the city of Edinburgh at a higher price than 1s. 2d. a bottle, and enjoining the magistrates of Edinburgh to punish contraveners by fine and imprisonment. I presume that act is now in desuetude. But suppose that you were to re-enact it to-morrow, and a magistrate of Edinburgh, in obedience to your injunctions, were to send to jail an unlucky wine-merchant who had sold his claret at L. 3 per dozen, the Court of Justiciary could not decern you to expunge the act from the books of Sederunt; but I scarcely think they would doubt their power to find a libel against the magistrate for wrongous imprisonment competent at the instance of the Lord Advocate, or of the private party with his concurrence; and, if the fact were proved by the verdict of the jury, to send the magistrate to the place where he had sent the wine-merchant.

But I shall put a third case more to the point than either. Suppose the General Assembly in May next, should pass an act setting forth in the preamble, that patronage is unscriptural, unwarrantable, contrary to the liberties of the Church, and offensive to the people of Scotland, and enacting that every presbytery should deprive of his license any preacher, and depose from his benefice any settled minister who presumed to accept of a presentation from a laic patron. The preamble of that act might be defended by an appeal to the standards of the Church, Books of Discipline, Directories, Acts of Assembly, and the works of ecclesiastical lawyers of undoubted authority. Maxims to that effect might be cited much more direct and explicit than any about violent intrusion, or the necessity of popular calls, and susceptible of no modification or restriction, express or implied. I shall read only one from Pardovan, Book I. Tit. I. sect. 11. three or four years before the 10th of Anne was passed. ‘ This “ Church maintains that the patron’s pretended privilege of a “ negative interest in the call and maintenance of ministers is a “ sinful and wrongous usurpation, without warrant from the “ word of God, destructive of the true liberties and interest of “ the Church, and most scandalously offensive to all ranks of “ Christians therein. This is gathered from their writings and

“sermons, and Act of Assembly, August 4, 1649.” Reference might also be made to the practice of the Church both before and after the 10th of Anne, and what are now called its purest days, in which, as already mentioned, ministers, I believe, were deposed, and certainly preachers often deprived of their license, on the ground of their accepting presentations. Now, although your Lordships could not rescind that act, if it were to be passed, I think it impossible to maintain that you would be bound to allow a public statute, the law of the land, and the law of the Established Church, to be violated with impunity, and a man to be deprived of bread, or the prospect of bread, whose only offence was that he had acted under the express sanction of an Act of Parliament. I conceive that your Lordships, in the case supposed, would be entitled and bound to give redress both to the patron and presentee, by holding the presbytery who acted upon it liable to both *ad id quod interest*. I do not think the act which I suppose, would be a greater violation of the 10th of Anne, than the existing act 1834. The one does indirectly and *per ambages* what the other would do directly and avowedly. There is this difference, however, between them, that the sole reason of rejection in the latter case would be specified and made known to all the world, namely, that the party had been guilty of homologating the law of patronage; whereas under this act it is left to the conjectures of the ignorant, and surmises of the malicious, to say why the *veto* has been interposed. A stigma is affixed to an individual, it may be for some mysterious offence, or some extraordinary defect, which is not explained, and which must for ever remain unexplained, and in consequence the character and prospects of an able and worthy man may be blasted while he lives. The rejected of Auchterarder may be the rejected of every parish in Scotland to whom he is offered.

But, perhaps, I am now overstepping the limits which I prescribed to myself, in considering how the Act 1834 may work in other cases, instead of how it has worked in the case of the patron of Auchterarder and his presentee. I will therefore add only a few remarks on the shape and conclusion of the Summons. I conceive that an action of declarator is the competent and proper form to try the question which has been raised. On this point the case of Unst and other cases quoted at the bar are conclusive, in which this Court sustained its jurisdiction, and decerned in terms of the declaratory conclusions of the libel.

In some of them also the presbytery was held to be the proper party, in declaring the wrong which that court was alleged to have committed, and also, I conceive, as entrusted with the care of the benefice during the vacancy;—in others the presbytery themselves were pursuers.

With regard to the present Summons, I think it is competent for your Lordships to declare, and that you ought to declare, that the Earl of Kinnoull is the undoubted patron of the parish; that the pursuer, Robert Young, was legally presented to the parish; that the presbytery of Auchterarder was bound to take trial of his qualifications; and that he was illegally rejected on pretence of giving obedience to the Act 1834, which it was *ultra vires* of the General Assembly to pass. With these findings, I am of opinion that the case should be remitted to the Lord Ordinary, to consider the petitory conclusions, and to do as he shall see just. Some of those petitory conclusions are, I think, clearly competent; in particular those which relate to the temporalities of the benefice, in so far as the patron is concerned. On the other hand, I think the conclusion that the presentee should be found entitled to the stipend, manse, and glebe, during the vacancy, is incompetent. He can have no right to the fruits of the benefice until he shall be inducted. If he had inserted a conclusion for damages it might perhaps have been sustained. A conclusion for damages at the instance of the patron might also have been competent. But upon that point, as it is not here, I give no opinion. One of the conclusions is, that the presbytery should be decerned to take Mr Young on trials. That deserves further consideration. We have interdicted presbyteries once and again from proceeding to trials, and it seems to follow a *converso* that we can ordain them to proceed. It seems also to follow as a corollary, from the act 10th Anne, which establishes a civil right in the patron and presentee, and imposes a civil as well as religious duty on the presbyteries to make them effectual.

With regard to the execution competent to enforce our decrees, that point has been exhausted by Lord Mackenzie, and I will add nothing to what he has so admirably stated.

Friday, March 2.

THE LORD PRESIDENT.—“ LORD FULLERTON.”

LORD FULLERTON.—MY LORD PRESIDENT,—I wish, for many reasons, that I could have availed myself of the excuse, which, differently circumstanced, I might have had, for declining to enter at large into the consideration of this question. For if I had been able to adopt that view of the case in which all of your Lordships who preceded me have concurred, I doubt much, whether I should have ventured to attempt any additional exposition, of the grounds on which that view was to be supported. But, after bestowing all the attention on the case which was within my power, and which was due to its importance, I have formed a different opinion. I have then no alternative: I feel it to be necessary to state fully, but as shortly as I can, the grounds of that opinion; and I do it, I confess, under the somewhat uncomfortable misgiving, that there may lurk, unperceived by me, some defect in a train of reasoning, leading to a conclusion against which there is such a formidable array of authority.

There are here two questions which admit of being kept, and I think may be beneficially kept distinct, as has been done by the Judge who has just delivered his opinion; though I am inclined to reverse the order in which he considered them. The first regards the jurisdiction of the Court to entertain the purely declaratory conclusions of the summons, as directed against the presbytery of Auchterarder, to which, for the present at least, the inquiry is limited. The second, arising, if the former is decided in the affirmative, is, whether those conclusions ought in law to be sustained?

The first question is raised in consequence of the unusual position in which the case has been placed, by the course taken on the part of the pursuers in conducting it.

The summons is founded on the recital of the patron, Lord Kinnoull's, right to present to the Church of Auchterarder,—of the acceptance of that presentation, by his presentee, the other pursuer,—and of the various proceedings of the presbytery of Auchterarder, which terminated in his rejection; from which are derived the conclusions, being, *first*, that it ought to be found, that the presbytery were bound to make trial of the qualifications of the presentee, and are still bound to do so; and that, if upon examination the pursuer is found qualified, “the said presbytery” are bound and astricted to receive and admit the pursuer as “minister of the church and parish of Auchterarder, according to law;”—and that the rejection of the presentee without so making trial, and in respect of the veto of the parishioners, was illegal and injurious to the patrimonial rights of the pursuer, and contrary to the provisions of the statute and laws libelled. *2dly*, That it being so found, and in the event of the presbytery continuing to refuse to discharge their duty, &c. the said Robert Young, pursuer, ought to be declared to have the just and legal right to the stipend. *3dly*, That the presbytery of Auchterarder, and the collector of the Widows' Fund, ought to be decerned to desist from troubling him in the payment of said stipend, &c.; and, *4thly*, That the various heritors should be decerned to make payment of the stipend to the pursuer.

These conclusions seem to be exclusively applicable to the rights of the pursuer, the presentee; and there is, in addition, an alternative conclusion in favour of the other pursuer, the patron, for having it found and declared that he had legally exercised his right as patron,—that the presbytery have illegally rejected the presentee,—and that, therefore, the pursuer, the patron, “has right to, and is entitled to receive and retain the whole stipend and emoluments;” and then follows a set of conclusions against the presbytery, the collector of the Widows' Fund, and the heritors, resembling those above-mentioned, and applicable to this alternative demand of the stipend made by the patron.

Had either of these sets of conclusions, properly pecuniary, been insisted in, there could have been no doubt of the jurisdiction of the Court to entertain the question; and, in investigating it, to consider the legality or illegality of the proceedings of the presbytery, in so far as that might be necessary to the determination of the question of civil right,—a question which is clearly within its province. But when the case came before me in the Outer-House, the pursuers were met on the part of the defenders, the presbytery, by the objections, that it was not competent to conclude against the presbytery for payment of stipend,—and that, consequently, the pecuniary conclusions were not properly directed against them; and, in regard to the proper pecu-

niary conclusions for stipend, &c. the defenders denied the title of the presentee and the patron to insist in them,—and maintained, that, if the leading declaratory conclusions were intended as merely introductory to the proper pecuniary conclusions, *they* could not be reached, until the title or interest of the pursuers, in regard to the pecuniary conclusions, was sustained. But these pecuniary conclusions certainly raised questions which could not be assumed, without argument, in the affirmative. In the *first* place, it is a novel proposition that a presentee, without induction, is entitled to the stipend; and, *secondly*, since the statute of the 54th Geo. III. cap 169, gives the vacant stipend to the Widows' Fund, there arises a plausible objection, to say the least, against the title of the patron to insist for the vacant stipend. And accordingly, to relieve the case of those difficulties, as it appeared to me, the pursuers waived for the time, insisting in these pecuniary conclusions, and stood upon their right to insist in the leading, and merely declaratory conclusion of the illegality of the proceedings of the presbytery, as directed solely against the presbytery.

Now there certainly is no incompetency in this, as a party who raises a summons, containing a conclusion declaratory of a right, and follows that up by conclusions properly petitory, does not necessarily abandon the declarator, by abandoning or waiving, for the time, those petitory conclusions. But then it is equally clear that, in any question regarding the competency of the court to entertain the mere declarator of right, he, when he has separated the two sets of conclusions, cannot seek any assistance from those petitory conclusions which he has for the time waived; and that the whole question regarding the competency of the declarator must be treated as if the summons contained no other conclusion.

The present question, then, must be considered as purely one with the presbytery of Auchterarder, called as the defenders in a declarator, for having it found and declared that the presbytery have acted illegally in rejecting the presentee, and are still bound to admit him. According to the usual mode of treating reserved points, the presbytery, the defenders, are better entitled to assume that the petitory conclusions will be decided against the pursuers, than the pursuers, the parties who waive them, are to assume that they will be decided in their favour. But it is unnecessary either to assume the one or the other. The true view to be taken of the case in the position in which the pursuers have placed it, is, that the summons must be treated as one exclusively declaratory, and exclusively directed against the presbytery of Auchterarder.

What, then, is the nature of this declaratory action. That it is purely declaratory, when limited to the first conclusions against the presbytery, is obvious.—It contains no petitory conclusions of any kind. It does not even call upon your Lordships to discern

or ordain the presbytery to do anything, or to abstain from doing anything. It is limited to declaring what they were bound to do, and that what they had done was illegal. It is, to be sure, a declarator of right, but of what kind of right? Not a right to the stipend, or any other pecuniary and patrimonial civil benefit; but the right to be admitted minister of the gospel in the church of Auchterarder, coupled with the additional conclusions, that the presbytery have done wrong in rejecting him; that the presbytery were and are bound to take the presentee on trials, and if qualified, to admit him as minister of the church of Auchterarder, and that they acted illegally in rejecting him.

In my opinion, then, the conclusion truly aims at the declarator, not of a civil, but of an ecclesiastical right, directed against the party, by whom that ecclesiastical right is said to have been withheld. And this view of the nature of the summons, when so limited, raises the *first* question, whether such an action, directed solely and substantively against the presbytery of Auchterarder, can be entertained by this Court?—It appears to me that it cannot. It is true that mere declarators of right are perfectly well known in the practice of our law, and the competency of insisting in them disjoined from any petitory or pecuniary conclusions, of which the right sought to be declared may form the basis, is beyond the reach of dispute. But in the general class of cases of that kind, the rights sought to be declared, are mere civil or secular rights, clearly within the jurisdiction of the Court,—and they are rights, in regard to the granting or withholding of which, the defenders are clearly under a civil or secular obligation. But the present case is widely different.—This action, as now insisted in, is directed against a body of public functionaries, who within their own resort, are, in my opinion, absolutely independent of your Lordships; and it is brought for declaring an ecclesiastical right, a matter as clearly within their own resort. And this view of the case does not interfere, in the slightest degree, with the rule so often repeated, that a right of patronage is a civil right. That is quite true; but, like many other principles, its apparent application to the matter in dispute arises from its undefined and unqualified generality. It is a civil right. It may be bought and sold, and litigated for in a civil court: and in regard to this last quality, the presbytery can found nothing on its ecclesiastical character, in order to claim an immunity from civil jurisdiction. If the presbytery challenge the title of a patron, his right may be declared against them, and if they claim the *jus devolutum*, that claim may be put down by a civil action.

But if it is meant to be inferred, that, because a patronage is a civil right, the various rights created by its exercise are civil rights, the proposition is erroneous, as may be easily seen by considering

of what those rights consist. They comprehend, in the first place, a claim to the emoluments of the living—which clearly is a matter of civil right; but further, they give a claim to the important and sacred trust of the *cura animarum* of the parish; and besides, in this case, as in most cases in Scotland, where the *ministerium vagum* is not permitted, they include the claim to be ordained minister of the gospel. Now these two latter rights, though arising from the exercise of the civil right of patronage, are unquestionably and exclusively spiritual or ecclesiastical; and the corresponding obligations lying on the functionaries from whom they are sought, are of the same character. But it is these last rights, and these last obligations alone, which are sought to be enforced by the summons as now limited,—the sole object being to declare, that the presbytery acted illegally in withholding them, and that they are now bound to grant them. The question then is, can *these* rights be declared against the presbytery in a civil action? For it will be observed that at present these rights are not stated by way of narrative or subsumption, as forming a link in the chain of reasoning, in support of any pecuniary conclusion. They are directed substantively and exclusively against the presbytery; and thus, in my opinion, can be viewed only as an attempt to review the proceedings of the ecclesiastical body, in a matter strictly within *their* province, and beyond that of this or any other civil court.

And in other circumstances, I should hardly have thought it necessary to guard against the supposition, that this view in any way impeaches the dependence of the Church on the State; a point on which we have heard so much in the course of the argument. It was admitted on the part of the defenders, and indeed cannot be reasonably denied, that, however high and superior to all earthly jurisdiction, the church in the spiritual sense may be, still the Church as an establishment,—as a privileged and endowed Church, owes its institution to the State, and is the creature of the law of the land. In that particular the Church and its courts stand exactly on the same footing as the civil courts, which draw their jurisdiction from the same source. But what is gained by that admission in relation to the present question?—Surely it does not warrant the conclusion, that when the Church Courts go wrong in the exercise of their ecclesiastical functions, the Civil Courts are entitled to set them right, and either to compel or to recall the exercise of the powers, with which the State has entrusted them. It does not and cannot follow from the circumstance of the church being, as an establishment, subject to the Legislature, that either the Church or the Church Courts are subject to the Court of Session. The answer to such a pretension is obvious—that, by the laws of the State, each class of courts has its proper

sphere, which the other is not entitled to invade ; although within that sphere, it may happen, God knows, that both the one and the other may go far enough wrong, and may do so without any other remedy, than that afforded by the voice of public opinion, or the interference of the Legislature.

It may be, that, in some systems, one supreme court has jurisdiction over all the subordinate judicatories, to which the discussion of the different descriptions of rights and other subjects of judicial decision are entrusted. The policy of this country has been different. It is quite well known that there are various courts, each supreme in its own province, and within which none of the others is entitled to intrude, either cumulatively or by a power of review. Of these I must consider the ecclesiastical judicatories of this country to form a class, just as independent within their own department, as the Court of Session, as the Court of Exchequer, or the Court of Justiciary. The notion that, but for the superintendence of the civil court, great wrong may be done without a remedy, appears to me to be little better than a delusion. In one sense there must always exist the possibility of a wrong without a remedy, as long as there exists a possibility of error, of precipitancy, or of prejudice in the individuals of whom all courts are composed. Accumulate check upon check, and appeal upon appeal, the last and only security must be, in the enlightenment and conscience of the supreme judge or judges, acting in the face of the country, and subject to the control of the Legislature. When it is found that one part of the complicated judicial machinery is so deranged as to jar with and impede the rest, measures may be taken, and no doubt will be taken, to remedy the evil ; but until that be done, the different courts of co-ordinate jurisdiction must be confined to their proper limits. Ecclesiastical jurisdiction must be kept distinct from civil or secular ; and while that distinction exists, I am not entitled to assume that the control of the one by the other, is demanded by the necessity of the case, and thus, reversing the ancient error, to provide against the possible fallibility of the Church, by the supposed infallibility of the Court of Session, or any other civil court.

And it will be found, that the words in the Act 1592, if that act can be considered as *in terminis* in force, of which I have great doubts, leaves the matter just where it stood. That was an act for regulating the powers and duties of the Church judicatories ; and of course it must be held to be, according to the sense of it entertained by those judicatories, the rule of their procedure. But that is immaterial in the present discussion, because the act certainly contains nothing empowering any other judicatory to inquire into and determine, how far those rules have been rightly construed and duly observed. Just suppose an act passed to regulate the Court of Jus-

tiary, or the Court of Exchequer, binding or astringing them to do or to abstain from doing certain things. It is quite possible, that very important civil rights might depend on their obedience to those enactments. But it never could follow, from the existence of the obligation so enacted, that it could be directly enforced in the Court of Session, by a declarator against the functionaries who were charged with disobeying the enactment. The question in all such cases must be, not whether there is a right and obligation, but whether the right or obligation be such as to fall within the resort of the Court before whom the action is brought?

Neither is there the slightest ground for alarm, that this principle ever can place the civil rights of parties at the discretion of an ecclesiastical jurisdiction. For whenever a question of civil or patrimonial right does arise, the case is necessarily brought within the province of the civil courts,—and in order to the giving or refusing redress for the alleged wrong, those courts will unquestionably be entitled to judge of the legality of the whole proceedings which led to the result complained of,—and, in the course of that inquiry, to determine whether, and how far, the ecclesiastical courts may have gone wrong in matters on which their opinions is not absolutely conclusive. Thus, when the petitory conclusions of the present action come to be insisted in,—and when it shall be found that those petitory conclusions in any way depend on the legality or illegality of the rejection of the presentee, your Lordships will be clearly entitled to exercise a sound judgment on all those points, of which the determination is essential to the extrication of the question of civil right. But, taking the declaratory conclusions, as now insisted on, and stripped of those or of any other pecuniary consequences, and calling upon your Lordships to find that the Presbytery of Auchterarder, an ecclesiastical body, have done wrong in refusing the presentee an ecclesiastical right, viz. the cure of souls, and ordination as the minister of Auchterarder, I consider the case to be clearly beyond our province. This distinction is so perfectly well understood in practice, that I could have hardly anticipated the necessity of illustrating it. It has frequently happened, that questions of civil or patrimonial right arise, which involve in the train of reasoning necessary to resolve them, points which have been adjudicated, but to a different effect, in other tribunals. Then arises the opportunity for the operation of that safeguard against the illegal encroachments upon civil rights if attempted by other tribunals. Your Lordships, *then*, are not bound to take the law on those matters from those other tribunals, but, acting upon your own lights, to determine every point necessary as the means for reaching that conclusion which is undeniably within your own jurisdiction. The legality of the resolutions of a branch of the Legislature,—points of peerage,—questions of ecclesiastical law,

—may in this way be all competently brought within the cognizance of the Court. But it would be rather a startling proposition to maintain as an inference, that, in such cases, the courts of law could entertain actions directly against the public bodies or functionaries, from whose actings the questions had taken their rise, for the purpose of obliging them to do what they had refused to do, or to undo that which they had already done.

Neither do I think that we can listen, here, to the supposed competency of your Lordships granting civil redress, in the event of the declaratory conclusion being sustained, as, for instance, that such declaratory conclusion might support the claim of the presentee to the stipend,—might bar the *jus devolutum* of the presbytery,—nay, might be the foundation of a diligence against the presbytery to take the presentee on trial, and admit him—or even form the ground of an action of damages. Some of these seem to me to be illustrations, which are darker than that which they are meant to enlighten. They are truly attempts to demonstrate the point now before the Court, by assuming postulates more startling than the proposition which they are brought to support. Such, for instance, is the notion, that this Court could give authority to charge the presbytery to admit, that is, to ordain, the presentee as minister of Auchterarder. But it is needless to go into these matters. It is possible that the Court *may* have such power ;—it is possible that the presentee, without induction to the cure, *may* be found to have a right to the stipend, and that the presbytery may be found excluded from the exercise of the *jus devolutum* ;—nay, it is possible, although I am certainly not at present prepared to assent to any of these propositions, that these reverend gentlemen, the defenders, *may* be exposed to an action of damages for doing that which, by the law of the Church, and the special direction of their ecclesiastical superiors in this very case, they were enjoined to do. But these suppositions afford us no assistance in the present discussion, for, even the supposed action of damages implies the existence of a question of civil or pecuniary claim, of which this Court would be entitled to take cognizance. Besides, and what is conclusive here, we are certainly not entitled to take cognizance either of that, or of any of the other suppositions, until such questions are competently raised. But they are not raised here. There is no question here regarding the *jus devolutum*, the claim of damages, or any of the other matters just referred to. They do not, and could not, enter into the present record, and still less into the present discussion, limited as it is by the act of the pursuers themselves. The defenders are therefore not bound to argue them ; and if they are dispensed from the necessity of any such argument, I must consider myself, not only as dispensed, but as bound to abstain, from making them the subject of any opinion.

It will not do, then, to assume, in discussing the competency of the present declarator, that such civil redress will be given, and must be given in some future or possible action, and to found upon that assumption an argument in support of this declarator. On the contrary, in considering the conclusions as they are now limited, your Lordships are bound to assume the possibility that no civil result whatever can follow against the presbytery from such a declarator, and then to consider whether such conclusion can be regarded in any other light, than as an attempt to review the judgment of an ecclesiastical court on a claim for admission and ordination, being a point clearly within their own exclusive jurisdiction.

It only remains to be inquired, whether the various cases cited by the pursuers afford any support to the competency of these declaratory conclusions. I think it clear that they do not. In every one of the cases alluded to, the jurisdiction of the Court was necessarily let in, by the existence of a competition of civil or pecuniary rights. Thus in the case of Auchtermuchty, the question was, whether or not the patron was entitled to retain the stipend, in competition with an incumbent admitted in defiance of his presentation? That question necessarily embraced the consideration of the legality or illegality of the admission of the incumbent. It was found competent for the Court to consider that point; but nothing can be conceived more guarded than the judgment ascertaining and defining the principle, upon which the competency of such an inquiry was sustained. One might think that it was worded for the express purpose of guarding against the doctrine now maintained on the part of the pursuers. By the first interlocutor it was found, “that the *right to a stipend is a civil right*, “and therefore, that the Court have a power to cognosce and determine upon the legality of the admission of ministers, *ad hunc effectum*, whether the person admitted shall have right to the stipend or not.”

The case of Culross, 26th June 1751, Mor. 9951, was one of exactly the same kind. It was a competition for the stipend between the patron, whose presentation had been rejected, and the incumbent settled on a call at large, as if the presentation had been in the hands of the presbytery *jure devoluto*, so that it, too, was truly a competition for a pecuniary right. The next case, that of Dunse, is an authority against the pursuers. There, the presbytery objecting to the presentation, as only held in trust for a patron disqualified, appointed a moderation of a Call without regard to it, in virtue of the *jus devolutum*, and the patron brought a declarator for ascertaining, *inter alia*, that he had presented in due time,—and that the right had not fallen to the presbytery,—and in this declarator he was successful. This clearly raised the question of civil right,—a competition for the patronage, *pro hac vice*,—to

which the presbytery were the proper parties. But, according to the report of Lord Monboddo, "there were still two other conclusions that the Court *would not meddle with* ; one, that the patron was entitled to the stipend, which the Court thought could not be declared against the presbytery ; and the other, *that the presbytery ought to be discharged to moderate a Call, or settle any other man*, because that was *interfering with the power of ordination, or the internal policy of the Church, with which the Lords thought they had nothing to do.*" This is a much stronger case than the present. In the case of Lanark, the judgment of the House of Lords, reversing that of the Court of Session, was on a competition for the stipend, between the Crown, found to be true patron, and the incumbent settled on a presentation from another party, whose right to present had ultimately been rejected. Lady Forbes's case was another, of a claim for stipend, in which it was found that the incumbent settled on presentation of pretended patron, whose right had been found bad, could not claim stipend against the true patron. The case of Lord Dundas was one regarding the *jus devolutum*, between Lord Dundas and the presbytery ; and although the declarator there, seems to have originally embraced conclusions, resembling those now under consideration, it was, I think, shown satisfactorily by the Solicitor-General, that those conclusions were departed from, and that the judgment ultimately pronounced was confined to the point of civil right.

In the case of Kiltarlity, an interdict was granted against the presbytery proceeding under a particular presentation. But there the only matter in dispute was the presentation, viewed in the light of a civil right—the right of the patron in the particular case to exercise his power. It was in substance an interdict against the presbytery receiving or acting in respect of a particular presentation ; just raising the question, which might have been competently raised in the form of a declarator, without any interference with the proper ecclesiastical power of the presbytery, viz. whether the patron had, in the circumstances of the case, a power to present or not.

It is true that in all or the greater part of these cases, pretensions were advanced by the presbytery, to which the Court did not listen ; viz. that even in the discussion of the points of civil right, the legality or illegality of the proceedings could not be challenged, and that the judgments of the Ecclesiastical Court were to be held final and conclusive. Carried to that extent their arguments were unsuccessful. It was found, as it appears to me justly found, that this Court was entitled, in determining the matter clearly within their own jurisdiction, to inquire into the legality of the proceedings of the Church Courts. But nothing in those cases gives any support to the notion, that, without raising any question of civil or pa-

rimonial right, the judgments of the Church Courts could be reviewed in the form of a declarator.

One of those cases, then, that of Dunse, is, according to the report of Lord Monboddo, of which I see no reason to question the accuracy, a decision directly against the jurisdiction which your Lordships are, in the present case, called upon by the pursuers to exercise. And in the leading case, that of Auchtermuchty, the judgment of the Court, sustaining the competency of cognoscing and determining upon the legality of the admission of ministers, is carefully put upon a principle, which, so far from being applicable to, is exclusive of the present. Accordingly, the negative inferences to be drawn from many of these decisions, are as strong evidence of the concurring opinion of the Bench, and the Bar, and the country, of the incompetency of proceedings like the present, as if they had been embodied in express judgments. Nothing can well be conceived more inexpedient and more injurious to the just interests of all parties, than the situation in which matters were left, by the decision of such cases as those of Auchtermuchty, Culross, Lanark, and others:—The patron, left to draw the stipend, to be applied to pious uses,—the incumbent, serving the cure, left unendowed,—and the presentee, whose legal rights were recognized by the judgments, left deprived of the situation and the emoluments to which he was entitled. Such a state of matters could not have been allowed to remain, if it had been supposed that any remedy was possible. But the remedy was easily attainable, according to the principles maintained in the present action. For although a presbytery might not, perhaps, have thought themselves authorized to recall the ordination of the incumbents who were settled in the different parishes, they unquestionably had the right to recall their settlements as the ministers of those parishes. The commission did so in the case of Auchtermuchty, in regard to the presentee, though that judgment was afterwards reversed by the General Assembly. Now if the Church courts have the power, as they unquestionably have, to reverse the settlements; and if there had been the slightest notion that, in the exercise of those powers, they could be controlled or dictated to by the civil courts, there cannot be a doubt that the attempt would have been made. Every circumstance upon which the jurisdiction can be maintained in the present cases, concurred there. There was the violation of the rights of the patron,—the illegality of the settlement of the incumbent,—and the manifest injury to the patrimonial right of the legal presentee; while the conclusion, namely, the divestiture of the incumbent illegally settled, was just as much within the powers of the Church Court, although not more specially limited to their jurisdiction, than their refusal to admit, being the point in dispute in the present proceedings. Upon con-

sidering the import, then, of these various cases, I think, while that of Dunse is a case strictly in point, the whole inferences fairly deducible from the others are directly adverse to the competency of the declaratory conclusions, as now insisted in.

In regard to the cases of schoolmasters under the act of the 43 George III. they proceed on a totally different principle.

By the Act 1693, confirming various prior statutes, the power of examining, judging of, and censuring schoolmasters, was committed to the presbytery of the bounds. In the case of Bothwell it was found that, by those statutes, schoolmasters were rendered exclusively amenable in the matter of qualification, &c. to the Church Courts, and that, consequently, the appeal from the presbytery lay, not to the Court of Session, but to the Supreme Church Courts. Afterwards, by the 43 George III., a power was conferred on the presbyteries, to judge in the censure and deprivation of schoolmasters, without appeal either to the ecclesiastical or civil courts; and, in the cases referred to by the pursuer, it has been found, that, in the event of the presbyteries exceeding, or failing to exercise, the powers thus conferred upon them, the Court of Session was entitled, not to review their judgments on the merits, but to annul those judgments, in respect of the violation of the conditions, expressed or implied in the statute. On these decisions it is enough to observe, that the appointment or deprivation of a schoolmaster is not properly, nor intrinsically, a matter of ecclesiastical discipline or order, like the ordination or deprivation of a minister. It is only from considerations of expediency, that the statutes subjected persons in that capacity to the control or jurisdiction of the Church Courts; so that, properly speaking, the office of a schoolmaster, to which certain emoluments are attached, is not by any inherent quality beyond the jurisdiction of the civil courts. And, consequently, when, by a special statute, the appeal to the Supreme Ecclesiastical Court was taken away, but taken away on conditions either expressed or implied in the statute, there was held to be no incompetency in the Supreme Court, the only Court which could apply a remedy, applying the only remedy which could be applied, by setting aside the judgments pronounced in breach of those conditions, but cautiously abstaining from any interference with the merits of each particular case.

It is clear that the principle upon which, in these last cases, the jurisdiction of the Court was sustained, cannot possibly apply to the present. And, indeed, it would be utterly impossible so to apply it, without at once asserting the unqualified right of your Lordships to review, even in ecclesiastical matters, the judgment and procedure of the ecclesiastical courts. If it be enough to state, as is done in this summons, that such procedure is injurious to

the patrimonial rights of property, there is hardly any one step which can be taken, which does not, indirectly or consequentially, affect those rights. The refusal of a presbytery to admit to a living is, certainly, not more injurious, than the divestiture of the party after he has been admitted. But it cannot be maintained that, upon that ground, your Lordships could directly review a sentence of deposition; and it could not stop there. Upon the very same ground, your Lordships might be called upon to find that a presbytery had done wrong, not only in deposing a clergyman, but in refusing to loose him from one parish, in order that he might accept a presentation to another and a better living; or in refusing to take a party on trials, with a view to a license. In all those cases, a possible or consequential patrimonial loss is just as clear as in the present. And in both of the latter, the effect might be, just as much as it is here, to narrow the right of the patron, by excluding the individual on whom he wished to confer the church. The answer to all such attempts is,—and I think equally good here,—that the right sought to be declared is truly an ecclesiastical right, and that such actions are just attempts to review or control the judgments or actings of independent tribunals in matters clearly within their own resort.

I think this incompetent, and, in so far as the defenders, the presbytery, are concerned, most unreasonable and unjust, inasmuch as it forces them into court to defend, not merely the propriety or legality of their own procedure, but that of a law of the church to which, whatever be its merits, they are bound to yield obedience. They are called upon to submit to a judgment finding them wrong, for doing that which, if they had refused to do, censure, and even the infliction of higher penalties, by superior ecclesiastical courts, must have been the consequence. I think this is a hardship which these reverend gentlemen ought not to have been subjected to. They claim no civil right whatever in competition with these pursuers. Nay the pursuers do not demand the establishment of any civil right against the presbytery. There is no conclusion regarding the *jus devolutum* in the summons, nor regarding any other civil right, which the presbytery might possibly claim, but which they might, at the same time, have an opportunity of abandoning if they thought proper. But they, the members of an independent court, are called upon to defend the legality of their procedure, a course for which I can see no authority in our practice. And in this view, the petitory conclusions for the present waived, only serve to render the incompetency and uselessness of the declaratory conclusion against the presbytery more glaring. When the proposition, that the proceedings of the presbytery were illegal, is put as an element of the argument leading to the proper petitory or pecuniary conclu-

sions against the heritors and the trustees of the Widows' Fund, it is consistent enough. But when the summons is split into two distinct parts, the declaratory conclusions against the presbytery, and the petitory conclusions against the others, the one part of it is absolutely contradictory to the other. The first declaratory conclusion is, that the rejection by the presbytery is injurious to the pursuer's patrimonial interests. That being found, what is the result,—*that, if the presbytery continue to refuse to induct the pursuer, he shall still have a right to the stipend and whole other emoluments of the living.* Now, if this be so, where is the sense of any declaratory conclusion as to illegality against the presbytery? That point evidently ought to be tried, not in an action against the presbytery, but between the presentee, the heritors, and the Widows' Fund. The legality of the proceedings may, *ad hunc effectum*, as in the case of Auchtermuchty, be questioned in that discussion; but that affords no ground for a special declaratory conclusion against the presbytery as parties. Nay, it is absolutely fatal to any such conclusion. For that conclusion is bottomed on the subsumption, that the rejection was prejudicial to the patrimonial interests of the pursuer; while the pecuniary conclusion is, that his patrimonial interests are no way affected by the judgments of the presbytery, as he claims right independently altogether, or rather in defiance of that judgment, to the full emoluments of the benefice.

In these circumstances, then, I think the declaratory conclusion against the presbytery cannot be sustained, and that the summons, in so far as regards the substantive declaratory conclusion against the presbytery, ought to be dismissed, reserving to the pursuers their right to question the legality of the procedure, *ad hunc effectum*, viz. in discussing the pecuniary conclusions of this or any other summons which the pursuers may raise.

I have said so much on this point, because I think it is of the utmost importance to observe, with the greatest scrupulosity, the limits of our own jurisdiction in competition with that of other tribunals,—and to abstain most cautiously from all pretensions leading to a collision in relation to matters, on which every collision is to be deprecated, and in which, it appears to me, collision is to be easily avoided. Not, indeed, collision of opinion, for that may be unavoidable. When questions of civil right arise, involving the legality of that procedure, your Lordships must judge of it,—and, in judging of it, may take a view different from that of the church courts. But collision of jurisdiction is a different thing. That can be easily prevented, by the simple course of confining ourselves to the decision of points of civil and patrimonial right, and leaving unquestioned, uncanvassed, and undecided, the legality or illegality of the proceedings of an independent jurisdiction, until such points are raised in that

form, viz. as involved in questions of civil right, which is indispensable to bring them competently within our cognizance.

But while this is the opinion which I have formed on the point of jurisdiction, I am unfortunately not relieved from the necessity of proceeding, as that opinion is at variance with that of the majority of the Court. Then what may be called the merits will remain to be considered, viz. whether, holding the jurisdiction to be established, the proceedings of the presbytery were illegal, meaning by that term, an infringement of the civil rights of the patron and presentee. That they were legal, according to the law of the Church, is undoubted. They were exactly agreeable to the general enactments of the Church, passed in its legislative capacity,—and, besides, they were warranted by the order of the General Assembly, in their judicial character, and the decision of the 30th of May 1835, “Remitting to the presbytery to proceed farther *“in the matter, in terms of the interim acts of the last Assembly.”* Were these proceedings, then, had by the presbytery in this case, infringements of the civil rights of the pursuer or not? Did they or did they not exceed the powers vested in the presbytery, in regard to the admission or ordination of ministers, and do they warrant the declaratory conclusions which are now sought for by the pursuers.

But, in canvassing these questions, we must examine particularly what was actually done by the presbytery in this particular case; and what the pursuer maintains they are bound to do. For I think we are not entitled, and not called upon to discuss, the general merits of the declaratory enactments, and the accompanying regulations of the General Assembly. We are not considering the Act of the Assembly, but the special procedure of the presbytery with relation to this particular case, and the special conclusion of this particular summons;—a distinction which has been lost sight of in the course of the argument. Indeed, so completely has this been the case, that, if we did not keep the summons steadily in view, if we were to regard merely the argument, one might be led to imagine that this was not an action against the presbytery of Auchterarder, for refusing to admit the presentee, but an action against the General Assembly, for having passed an illegal enactment. And this is the more extraordinary, as in this particular, the summons is singularly guarded and explicit. Neither there nor in any of the pleas in law for either party, is there, as far as I can see, any mention of the act of Assembly. The action is laid, and properly laid, on the specific acts which were done by the presbytery; and, in relation to the particular view which I take of this part of the case, it is of importance to consider, *1st*, The procedure which was actually had; *2dly*, The particular grounds upon which illegality

lity is charged against that procedure ; and, *3dly*, 'The particular conclusions which are drawn from these premises.

In the *first* place, then, as to the procedure, the presentation was sustained, in so far as any presentation ever is sustained, viz. to the effect of appointing the Call to be moderated in, so that there is no question regarding the right to the patronage. The next step was giving the necessary intimations of the days on which the presentee was to preach,—and the 2d of December was appointed to moderate in a Call, in the usual way, to Mr Young to be minister of that parish. On the day appointed, (2d December,) there was produced and read a Call to Mr Robert Young, and this Call was signed by Mr Lorimer for the Earl of Kinnoull, and by Michael Todd and Peter Clark, heads of families. The presbytery then proceeded, in terms of the third regulation of the interim act of the last Assembly, anent Calls, to give an opportunity to male heads of families to give in special objections or *dissents* from the Call. No special objections were given in. The presbytery then, in conformity with the regulation of the act of Assembly, proceeded to afford an opportunity to the male heads of families whose names stand upon the roll, to *give in dissents from the Call and settlement of Mr Robert Young, as minister of the Parish*.

Various persons then standing on the roll gave in dissents, amounting to 287 out of 330. Another meeting then was held on *16th December 1834*, for the purpose of ascertaining whether or not the major part of the persons on the roll, and who dissented, do still adhere to their dissents, and no dissents were withdrawn,—and the presbytery found, in terms of the regulations, that there is a majority of persons on the roll who still dissent. At the same time a motion was made, that the Call to Mr Young should be taken into consideration, and should be held not a good or sufficient call, in respect it was only signed by three individuals, and only two members of the congregation. This motion was rejected as being incompetent at this stage of the business ; and, on account of certain appeals having been taken against their proceedings to the synod, “the presbytery sist procedure in this case till they learn how these appeals are disposed of.” When these appeals, into the details of which it is unnecessary to enter, were disposed of, the presbytery, on the 7th July 1835, proceeded agreeably to the remit from the General Assembly ; and in terms of the interim acts of the last Assembly, and, in obedience of the 14th article of the regulations, they rejected Mr Young, “so far as regards the particular presentation, and the occasion of that vacancy in the parish.”

The rejection, then, took place in terms of the acts and regu-

lations of the Assembly ; and there seems to me to be no difficulty in determining the true principle and ground of that rejection. The Act of Assembly of May 31, 1834, is termed, an *Interim Act on Calls* ; and the regulations are embodied in another interim act, of 2d June, for carrying the preceding declaratory enactment of the 31st of May into effect. These regulations provide for two cases, *1st*, That of special objections being given in ; which objections, if they are ultimately sustained, are, by the 6th article, declared to be the ground of a finding, that the presentee is not qualified. *2dly*, In the event of no special objections being given in, dissents may be given in, without reasons, by the heads of families. The direction applicable to the case of the number of dissents, not amounting to a majority of the persons on the roll, is contained in the 12th article. The provision for the other event, viz. the majority of the persons on the roll maintaining their dissent, is in the 14th article.

Now the expressions used in these two articles are not quite co-relative :—By the 12th article it is provided, that, if there is not a majority of the heads of families dissenting, the presbytery *shall sustain the Call* ; and in the other case, of a majority of heads of families dissenting, it is declared, *they shall reject the presentee*. But I think it would be a most unreasonable piece of hypercriticism to found any thing on such a distinction. In the one case, every Call not dissented from by a majority of the heads of families is to be sustained ; and by the 14th section, the majority of dissents is to operate as a rejection of the presentee, but evidently on the ground that the Call is insufficient. No doubt the word “ Call ” has been omitted in the 14th regulation : But, looking at the whole terms and object of these regulations,—considering that the part of the procedure at which the dissents are given in, and at which the presbytery are to take those dissents into consideration, is the receiving the Call,—I think that the 14th section is just equivalent to the provision, that a Call dissented from by the majority shall not be sustained, and the presentee consequently rejected. And there is nothing inconsistent in such a provision with the nature of a Call,—at least in the only sense in which it is of importance in the present question, viz. as importing a limitation of the rights of the patron. It is true that that document is, in form, a positive concurrence in the nomination of the presentee. But this is perfectly compatible, with the regulation on the one hand, that the mere absence of an express concurrence of a majority of a certain class of persons shall not be fatal to the Call ; and, on the other, that an express dissent shall be fatal to it. The effect of the regulation in this case was, that the Call, signed by only three parties out of 330 heads of families, was not in itself held bad, but required an express dissent

of a majority of those parties to make it so. These enactments, then, seem, if any thing, rather favourable than otherwise to the patron and presentee, inasmuch as they assume, that, in the matter of a Call, silence shall import consent, and enact that the presumption of such tacit consent can be excluded only by the expression of dissent.

Combining, then, the terms of the regulations of the Assembly with the judgment ultimately pronounced by the presbytery, I think it must be held to be a judgment rejecting the presentee, in respect that he had not a Call of the kind declared to be indispensable by the law of the Church.

That is truly the act which is charged against the presbytery, in the summons, and this leads me to the *second* branch of the inquiry, What is the precise nature of the illegality with which this act of the presbytery is said to be chargeable? For it is to be observed, that the illegality might be of two kinds. The rejection of the presentee on the ground of the insufficiency of the call, might be said to be illegal, inasmuch as a higher standard of concurrence had been required by the presbytery, in consequence of the Act of Assembly, than was warranted by the previous practice of the Church, and, in consequence, by the law. This is a perfectly relevant statement of illegality; but then in order to render it admissible or intelligible, it would have been necessary for the pursuer to state it distinctly as a ground of complaint, and to plead the call which he had actually received, and which had been defeated, by the unwarranted conditions superadded by the Act of Assembly. He must have stated this, just as he stated in the other part of the summons, that *though qualified*, the presbytery refused to take trial of his qualifications. Now your Lordships will observe, that that is not the nature of the illegality charged against the act of the presbytery. The pursuer does not put in plea the call which he had, as contrasted with that required by the Act of Assembly. He neither mentions the call nor the Act of Assembly from beginning to end of the summons.

But the illegality charged against the rejection might be of another kind, viz. that all demand of a call or concurrence was unwarranted, and that the presbytery were not entitled to require any thing but a valid presentation, and an acceptance by the presentee, in order to bind them to take him on trials. And upon looking at the summons, it must at once appear that it is this particular kind of illegality, which is in the summons imputed to the act of the presbytery.

It is there set forth, that the judgments or deliverances of the 2d December 1834, and 7th July 1835, were *ultra vires*, illegal and unwarrantable, inasmuch as the presbytery were bound and

astricted to make trial of the presentee's qualifications, and were not entitled to delegate to or devolve, &c. And after examination of the pursuer, the said Robert Young, being found to be duly qualified, the presbytery were bound and astricted to have admitted and inducted him into the office of minister. It then proceeds to state that, though the pursuer, the presentee, is qualified, the presbytery refused to take him on trials, or to admit and receive him, and rejected him as presentee, "expressly on the ground " that they cannot and ought not to do so, in respect of a *veto* of " the parishioners."

Though the meaning is here disguised by the form of expression, a very little consideration will shew that it is the second kind of illegality which is here charged, viz. that of requiring any call or concurrence whatever. There is not one word of the presbytery requiring the assent, or acting upon the dissent of the majority of heads of families. Heads of families are not mentioned. The illegality is said to consist in their delegating the duty of examining the pursuer *to third parties*, and their having rejected him in respect of a *veto of the parishioners*. But it seems to me clear, that these expressions apply to every call which is made the ground of refusing to take a presentee on trials. If a call is required and acted upon at all, it must necessarily operate as a *veto*; and, according to the view of the pursuer, as a delegation of the powers of the presbytery. If a call, signed as that of the petitioner was, by three names out of 350 heads of families or parishioners, is held bad, that must necessarily proceed on the silent veto of the 347 who have withheld their concurrence, and on the constructive delegation, thence arising according to the pursuer's argument, of the powers of the presbytery to the parties who have refused to sign. In regard to this matter, in regard to the rights of the patron, it is demonstratively a matter of absolute indifference, whether what is termed a *veto*, be exercised tacitly by a refusal to concur, or expressly by a dissent. And the nature of the illegality charged, is made still clearer by the pleas in law for the pursuers. These pleas in law do not say any thing of the majority of heads of families. According to the third plea, the presbytery were bound, in terms of the statute libelled, to have " themselves taken the pursuer on trials, and to have given judgment on his qualifications," &c. The fourth plea is, that according to the statutes, " it is illegal and unconstitutional, and contrary to the laws establishing the Church of Scotland as the " National Church, for presbyteries to refuse to execute that power " and duty, or to denude of the power and duty of collation, or to " submit the qualifications of the preachers and presentees to an " arbitrary power of rejection by *any portion of the parishioners*

“ *or hearers.*” And the fifth is, that “ a veto on the patron’s right of patronage and presentation *by the parishioners or communicants*, that is, an arbitrary rejection by them, of a presentee duly qualified according to the forms and trials of the Church, and licensed as a preacher of the Gospel, without any trial by the Church Courts, and without any cause assigned, *is illegal, unconstitutional, and incompetent.*”

There is here no reference either to the Act of Assembly, or to the majority of the heads of families. The pleas are put exclusively on the ground, that all reference by the presbytery to the concurrence or consent of any portion of the parishioners, hearers, or communicants of the parish, as a condition of the presbytery taking the presentee on trials, is illegal, unconstitutional, and incompetent.

This, then, being the special nature of the illegality charged in the summons, against the act of rejection complained of, the conclusions of the summons are strictly and logically consistent with the special illegality charged, and with no other. Had the illegality charged been that first mentioned, viz. requiring a higher standard of Call than that previously in use, and than that held by the pursuer,—being the kind of illegality which would have properly raised the question on the Act of Assembly,—he must, as already mentioned, have pleaded the Call which he had, and have concluded that *it* should be sustained as a preliminary to taking him on trials, which, however, would be rather a singular conclusion in a civil action. Accordingly, that is not attempted. The conclusion is, that he shall be taken on trials without any Call whatever. The words, “ *according to law,*” in the Summons, cannot possibly refer by implication to a Call. They are subjoined to the conclusion, as to receiving and admitting the pursuer after due trial and examination. But the leading part of the conclusion is quite explicit, that, *ante omnia*, and without any condition or limitation whatever, the presbytery were and are bound and astricted to make trial of the qualifications of the presentee; and if qualified—that is, as explained by the pursuers themselves, if satisfied of his character, of his ability and learning,—must admit him to the benefice. According to this reading of the summons, then, which I take to be the only admissible one, it is a summons founded on the rejection of the Call of the presentee,—charging, as the ground of illegality of that rejection, that the demand of any Call or concurrence whatever was illegal,—and concluding, in perfect consistency with those premises, that the pursuer shall be taken on trial without any Call or concurrence, even of the smallest portion of the parishioners.

Indeed, the pursuer must go that length to be consistent; for,

if he maintains that the ground of his rejection is bad, without maintaining that every rejection founded on the defect of the concurrence of the parishioners is bad, he is truly requiring the Court to determine, not that the requiring the concurrence of the parish, or, in other words, the *veto*, is illegal, but that, in the present case, the concurrence was not so defective, as to warrant his rejection; not that a *veto* is illegal, but that the veto in this case was by an insufficient number. He would be demanding of the Court to decide, not that a Call is unnecessary, but that the presbytery have rejected a Call which ought to have been sustained,—which last is exclusively of the resort of ecclesiastical courts. For, though your Lordships may possibly have jurisdiction to inquire, whether the requiring of a Call be or be not an infringement of the rights of patrons, yet, unless that question be decided in the affirmative, the discussion must be at an end, as the sufficiency of the Call, if required at all, is clearly an ecclesiastical matter, of which this Court can take no cognizance.

Looking, then, at the proceedings of the presbytery, combined with the enactments of the General Assembly, on which they are rested, and the terms of the summons, I think these inferences are inevitable, That the presentee in this case was rejected, on the ground of the insufficiency of the Call; and, That your Lordships are called upon to declare the illegality of that rejection, on the ground, that no Call or concurrence on the part of the parishioners is required to support a presentation, and that no bar can be interposed, between the admission of the presentation, and the taking the presentee on trials, and his ordination and induction, if those trials are satisfactory. That I must consider to be the question now at issue. And it is needless to state, that, whether the extent of its operation be considered, or its bearing on what has been immemorially treated as the law and authorized practice of the Church, it is a question of the greatest importance.

To a certain extent, no doubt, it affects the right of patronage; as the condition of a Call or concurrence on the part of the parishioners, subject to the control of the presbytery, does, of course, form a limitation of the patron's power to nominate. But that of itself is not conclusive, because, confessedly, the right of patronage falls far short of an absolute right to nominate. It is, in form as well as substance, a right to present, while the acts of acceptance and admission depend on the Ecclesiastical Courts, which courts have the power, not only of judging, but of fixing the requisite qualifications of the presentee. In another particular it is, in its own nature, a qualified right. It is a right to name, certainly not for the benefit of the patron, nor for the benefit, exclusively, of the presentee:—A third party, viz. the pa-

rish, having evidently the deepest interest of the whole three. In so far as the patron is concerned, it is more of the nature of a right to execute a trust, than the exercise of a discretionary power for his own advantage; and in the execution of that trust, it is undeniable that, to a certain extent, the Church Courts, as the guardian of the other interests, are associated with the patron. The question, then, is, whether or not in the present case the Church Court, one of these associates, has exceeded its powers, or encroached on those of the other; and, as in every other question involving the conflicting or balancing rights of parties or public bodies associated in the same act, the line does not admit of being drawn with precision. Even if that line were drawn by statute, it might be a matter of difficulty, but I do not think that it is. On the one hand, I do not adopt the argument of the defenders, founded on the Act 1567, c. 7, as absolutely conclusive in favour of the Finality and immunity from challenge, of every judgment pronounced by the supreme Church Courts regarding the settlement of a minister. It rather appears to me that that statute applied merely to the question of qualification in the proper sense of that term;—that when a presentee was rejected on the score of deficiency, the judgment of the General Assembly on his qualifications was to be final;—without going the length contended for by the defenders, that the judgment of the supreme Ecclesiastical Court, was in every one particular which could arise in the settlement of a minister, to be held as the law of that particular case; even when questions of patrimonial right, involving that point, came to be raised in the Civil Court. And, indeed, the plea founded upon this statute and urged to that extent, appears to have been repeatedly disregarded in many of the cases already alluded to, as to the patron's right to the vacant stipend, in consequence of the settlement of a minister by the Church Courts in violation of his rights.

On the other hand, I do not think, with the pursuers, that the question is entirely settled by the Act 1592, cap. 116. Even if the question depended on the particular words of that enactment, they would not be absolutely conclusive. It binds the presbytery to admit qualified ministers. But the words are quite general. Nothing is said as to the form of admission. And if by immemorial practice a form of admission had been established and recognized both by patrons and presentees, I see no reason to doubt, that any limitation of the patron's power of nomination implied in that form of admission, would have been effectual. But besides, looking at the terms of the Act 1690, cap. 5, and 1690, cap. 23, combined with the 10th of Queen Anne, cap. 12, I think there would be great difficulty, indeed, in holding the special provision in the Act 1592, on this matter, to be *in terminis* revived and

still in force For by the Act 1690, cap. 5, the Act 1592 was not revived in all particulars. It was only revived under the express "exception of that part of it relating to patronages which is hereafter to be taken into consideration." That matter was taken into consideration in the Act 1690, cap. 23, by which patronage was abolished, and the right of presentation transferred to the heritors and elders in each parish. Again, by the 10 Queen Anne, cap. 12, this last statute was repealed, in so far as relates to "presentation of ministers by heritors and others therein mentioned." But there is no alteration made on the Act 1690, cap. 5, so that at this moment there appears to me to be no part of the Act 1592 *in terminis* in force, in so far as regards the question of patronage.

But this, perhaps, is a matter of comparatively little moment, because the Act of 10th of Queen Anne contains a clause, by which, at any rate, the Act 1592 on this point must have been superseded. By this last statute it is provided, that the presbytery "shall, and is hereby obliged to receive and admit in the same manner, such qualified person or persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers presented before the making of this act, ought to have been admitted."

I confess that, in reading this enactment, I see no sufficient grounds for holding it to repeal that part of the previous Act of 1690, cap. 23, which directed the presentee to be proposed to the whole congregation to be either approved or disapproved by them, and authorized the presbytery to judge conclusively of those reasons of such disapproval. Presbyteries are directed by the 10th Queen Anne to admit qualified presentees in the *same manner* as "the persons or ministers presented before the making of this act ought to have been admitted." Now, as in this very statute of the 10th of Queen Anne, the right of nomination given to the heritors and elders by the Act 1690, cap. 23, is expressly termed a right of presentation—and as that act of 1690, c. 23, is only repealed by the 10th of Queen Anne, in so far as relates to the presentation of ministers by heritors and elders, I see no good reason for denying effect to the express terms of the statute, which, on the subject of the admission of presentees, refer to the manner in which they ought to have been admitted "before the making of this act." The perfectly consistent and obvious reading is, that while the right of presentation was taken from the heritors and elders, and restored to the former patrons, the mode of admission, that is, the admission by the presbytery on a definitive judgment of the reasons of approval or disapproval of the congregation, remained in full force. But I do not think it necessary to press this, because, from some reason or

other, it does not appear to have been generally received or acted on. And, at all events, it does not appear to be adopted by either party in this discussion. However they differ in other particulars, they seem to concur in holding by what I cannot help thinking a strained construction, that the manner of admission "before the making of this act," applies to the manner of admission while patronage was in full force, and prior to the Act 1690.

Even adopting this last construction, there is in the statute a reference to usage; and if it could be shown that in those early times, from the year 1592 downward, there was required, in addition to the presentation, a Call or concurrence of the people, of which the ecclesiastical courts uniformly judged, in admitting or rejecting the presentee, there would be an end to the question. If such form was part of their procedure in admitting and ordaining a presentee, the statute bound them only to admit in the same manner as before.

Certainly, the evidence laid before us of the practice prior to the Act of the 10th of Queen Anne is very imperfect. Indeed, there is hardly evidence at all on the matter—and this is not much to be wondered at, for, strictly speaking, the only relevant evidence, would be the evidence of the usage of presbyteries, in relation to the presentees of lay patrons. But that combination of circumstances did, as it so happened, hold for very short periods indeed, from the date of the Act 1592, till that of the 10th of Queen Anne. In the year 1612, Episcopacy was established, and continued in force until 1637. In the year 1637, Presbytery was again introduced; but, in combination with patronage, it continued only from that period to 1649, when patronage was abolished. Patronage was restored again by the act rescissory in 1661; but it came into operation not with the Presbyterian Church government, but amongst with Episcopacy, which was restored in 1662, and so matters continued until it was again abolished in 1690. There were truly, then, only the short periods between 1592 and 1612, and between 1637 and 1649, to which reference can justly be made in regard to the manner in which presbyteries were in use to admit the presentees of patrons—and, from this consideration, I am led to pay very little attention to that which occupied a considerable part of the argument, viz. the form of admission under the Directory of 1649, and under the Act 1690. The true question being, what was the usage on the subject of the admissions by presbyteries, of the presentees of patrons, I do not see what either party could gain, by referring to modes of admission, practised while no such combination of circumstances existed.

Throwing these out of view, the evidence is nearly a blank. No doubt we have evidence enough that the Church of Scotland,

from its earliest establishment, refused their sanction to the intrusion of ministers against the will of the parish, and repeatedly and uniformly protested against such practice. But how that principle was practically applied in combination with the rights of patrons—what kind of adjustment actually took place between the two rights, in the periods above mentioned, from 1592 to 1612, and from 1637 to 1649, we do not know ; though, from some of the documents referred to, as well as the temper and spirit of the times, one cannot doubt that, in one way or other, full effect was given to those pretensions of the Church.

In the absence of any previous information upon this point, I was much indebted to the researches of Lord Medwyn for the discovery of the proceedings in the settlement of Crail in the year 1647, though I cannot draw exactly the same inference. No doubt the party was settled on a presentation, but the entry on 17th November is, “*Compeared Commissioners from the parish of Crail, desiring the presbytery to proceed in putting Mr James Sharp on his trials, according to the presentation given last day, &c.*” It may be true that there is no evidence of a form of a moderation of a call ; but until some other authoritative explanation can be given of the appearance of the commissioners of the parish, the probable conclusion is, that, though a presentee, effect was given to his presentation as to taking him on trials, on the application of the parish, expressed through their commissioners. And certainly I see nothing in such a practice inconsistent with the earlier authorities cited from the canonists, or with the opinions entertained by the many learned persons of the Presbyterian church, on the subject of the right of election by the people. Though many of those authorities are adverse to the notion of the right of the people to elect, they all seem to be in favour of the right of the people to influence the nomination, subject always to the guidance or control of the Church,—a right perfectly consistent with the mode of admission now under consideration, in which, besides the presentation, there was required some concurrence on the part of the people, of which the Ecclesiastical Courts were to judge.

But I apprehend that in construing the act of Queen Anne, we are not confined to the authority of church writers, or to the obscure evidence of what took place prior to the passing of the act.

We are not now construing the act of the 10th of Queen Anne, as matters stood when it passed. When a statute refers to usage,—to the way and manner in which something has been, or ought to have been done, before it passed,—and when the evidence of such prior usage is obscure, the best of all readings must be, the usage which follows upon it, as decisive of the sense in which the parties having the best opportunities, and the greatest interest, to explain it aright, have explained it. So that in order to ascertain in

what manner presbyteries are bound to admit presentees of patrons, the most important, and, indeed, now the only conclusive, inquiry is, in what manner, that is, what are the forms in which those admissions have taken place for nearly a century and a-half since the passing of the act? And it does appear to me, that every form adopted by the Ecclesiastical Courts, invariably acted on and recognized in practice by patrons since that date, must now, whether forming an abridgment of the rights of patrons or not, be considered as binding, and as completely and effectually part of the law of the land, as if such form had been inserted expressly in the act of the 10th of Queen Anne.

It is in this view, and in consideration of the usage which has followed upon that statute, that I feel myself called upon to refuse assent to the conclusions of the present summons, which, as I have said before, are, however disguised, conclusions against the legality of a Call,—of any thing in the form of a concurrence of the parish, superadded as a condition of the efficacy of the patron's nomination, interposed between the acceptance of the presentation, and the taking of the presentee on trials, and admitting him to the benefice. For if there be one point ascertained in the practice of the Church, from the 10th of Queen Anne downwards to the present day, it is the indispensable necessity of a Call, or some kind of a concurrence of the parish, and the exclusive power of the Church to judge without appeal of such Calls or concurrence. And it is to be observed, that this is not merely the pretension of one of the parties whose rights are in dispute. The usage consists of a series of the acts of the Ecclesiastical Courts, exercised in the face of the public, and recognized and yielded to by every patron, who has presented to a Church since the days of Queen Anne. Nay, so deeply rooted is the conviction of the indispensable necessity of this form, that of these very pursuers, the conclusions of whose summons are destructive of the Call,—the one has actually signed, and the other received a Call, as part of the forms of procedure.

It is true that the decisions of the Supreme Ecclesiastical Court on the matter, *i. e.* on each Call that came before it in its judicial capacity, are not very uniform; nor is this much to be wondered at, considering the circumstances of the country, and the composition of that Court. The presbyteries, at first, did not confine the callers to the presentee alone, but sometimes, as they termed it, moderated in a Call at large, *i. e.* allowed a wider range of selection, and then settled the party whose Call they considered preferable. It is not to be disguised, that this procedure was a breach of the act of the 10th of Queen Anne, inasmuch as it settled a party without, or rather in defiance of a presentation. This practice was afterwards put an end to; and from the year 1730, downwards to

1749, various cases occurred in which, on appeal, the General Assembly directed a moderation of a Call to the presentee alone, expressly finding that no other was to be "*on the leet*." Upon this footing the matter has stood ever since. The Call has been limited to the presentee; but still the necessity of a Call, and the exclusive power of the church courts to judge in it, has, in so far as I can discover, been invariably recognized. And it is of little importance here to consider, what was the origin of the term "Call," and whether the word "Call," meaning the election of a minister, may not have been sometimes confounded with the "Call," considered as an invitation given by the parish to a presentee for his encouragement. It may be true, that, after the 10th of Queen Anne, this last was the only kind of Call of which, according to law, the case could admit. But still the fact is undoubted, that this invitation, concurred in to the extent which the Church deemed requisite, was held in practice indispensable to the settlement. It is a mistake to suppose the case of Currie was a singular instance of this kind. There are many others. Indeed, it is hardly possible to turn over the abridgement or index of the procedure of the Assembly without meeting them. Although in a great many, it does not appear whether or not the call rejected, had proceeded on a presentation, it is not to be taken for granted, that in those cases, the party founding on the Call had not received a presentation. The whole churches of Scotland are patronate; and though it is historically stated that many of the patrons did not at that time exert their rights, still, in a question of evidence, in a legal discussion, that presumption, as a general presumption, cannot be received. One inference, however, from those entries is evident, that in every case which appears to have been disputed, the sustaining of the call was held indispensable to the settlement of the party. And if anything is to be founded on the supposed limitation of those cases of rejection, to the cases in which there had been no presentation, some farther inquiry and more accurate investigation would be indispensable on this, which I cannot help thinking a most important point of the case.

But even from the cursory view of these Acts of Assembly, which I have been able to take, a great many cases appear, in which it is quite clear that the judgment of the General Assembly upon the Call, did enter into competition with the rights of patrons. Some of them, I think, were quoted by the Solicitor-General. Such are those of Cluny, 1744; Kirkowen, the same year; Kirkaldy, 1741; Kirkpatrick, 1746; Methven, 1750. But there are one or two more which appear to me to be so exceedingly instructive on this point, that I shall make no apology for quoting them at greater length. In 1751, there is "A reference from the synod of Lothian and Tweed-

“dale, of a case brought before them by appeal from the presbytery of Biggar’s sentence in the settlement of the parish of Biggar, pronounced in April last, viz. that, in the present circumstances, they could not proceed to the settlement of Mr William Haig, the presentee; and that the honourable patrons be applied to, to ease the presbytery in this matter, read, and it being represented *that there was no concurrence with the presentation of any who reside in the parish, save one*, the Assembly found that, in the present circumstances, it is not expedient to appoint the settlement of the presentee, and remitted to the presbytery of Biggar to deal with all concerned, in order to bring about a comfortable settlement of the said parish.”

The next year, in 1752, there appears a reference to the commission, of an appeal from a sentence of the presbytery of Biggar, finding the said parish “in the same circumstances it was in at last General Assembly, and, therefore, *that they could not proceed in the settlement thereof.*”

The next year the presbytery are appointed to “represent the state of the case to the parish, and to deal with them further, in order to reconcile them to Mr Haig, the presentee.”

And in 1754, there is an entry, that “there being a prospect that this matter would be brought to such a conclusion as should be to the satisfaction of all concerned, it is agreed that this question lie over till next Assembly; and in case the presentation to Mr Haig to be minister of that parish is taken out of the field, the presbytery of Biggar empowered to proceed to the settlement of the said parish, according to the rules of the Church.”

Again, in 1768, there is an “appeal of George Cockburn-Haldane of Gleneagles, Esq. and other callers of Mr Patrick Crichton, the Crown’s presentee, to be minister of Glendovan, from a sentence of the presbytery of Auchterarder, the 5th day of April last, *finding there was no call before them for Mr Crichton, and therefore could not proceed to his settlement as minister of Glendovan*, and affirmed by the Synod of Perth and Stirling heard: and the sentences of the presbytery and synod affirmed.”

In the same year 1768, there is another entry of the same kind: “An appeal of Sir John Stewart of Allanbank, patron of the parish of St Ninians, and several heritors in the said parish, concurring in a Call to Mr David Thomson, from sundry sentences of the presbytery of Stirling, *finding there was no sufficient call before them for Mr Thomson, and therefore could not proceed with his settlement as minister of St Ninians*, and affirmed by the Synod of Perth and Stirling, heard, and the sentence of the presbytery and synod affirmed.”

The final result of these two last cases is of some importance. It would appear that the presbyteries were disposed to consider

the judgment of the General Assembly, as final against the presentee, and as exclusive of all attempts on his part to obtain a farther concurrence, sufficient to support the presentation. For in the year 1769, the judgment of the presbytery of Stirling, finding that the former judgment of the General Assembly, in the case of St Ninians, was final, was reversed—and the Assembly appointed moderation of a call to the presentee. The same course was taken in Glendovan—and, in 1770, it appears that calls had been obtained in both cases, which were ultimately satisfactory to the General Assembly, and which led to the settlement of the presentees.

Now, I think, that these cases are absolutely conclusive of the practice of the Church in the admission of ministers, forming, by the force of a usage to which the patrons and presentees were parties, part of the law of the land—and I think the cases all the better, for there being in some of them, dealings and compromises between the Church and the patron. It is just what was to be expected in a matter, in which both the church courts and the patron were concerned—in which both were most properly disposed to respect the rights of each other—and in which, consequently, the admitted and unchallenged rights of both, led to an adjustment in which those rights were mutually observed. But the cases of St Ninians and Glendovan are particularly striking; because they afford instances illustrating not merely the ground on which the presentee was rejected, but the condition upon which he was ultimately received, the first being the insufficiency, and the second being the sufficiency of the call, as judged of by the church courts. It is impossible to conceive cases more decisive, in the first place, of the practice of the Church in requiring a call—and, secondly, of the recognition of that right in practice by patrons. And, accordingly, there is not one case in which the rejection of a presentee on the score of the insufficiency of call, has been made the subject of challenge in the civil court; though the patrons, in consequence of their right to retain the stipend upon an illegal refusal to admit, had the means on every such case of rejection, to raise the question.

From the date of these decisions last referred to, I mean from 1770, and perhaps from an earlier period, the General Assembly became much more lax in their opinions, in regard to what should be considered as a sufficient call in each particular case. The records of the Assembly exhibit numerous instances of calls being rejected by the presbyteries, and ultimately sustained by the General Assembly. The index or abridgement of the proceedings of the Assembly does not give any information of the particulars of each case. But it is said, and, I believe, truly said, that, in a great number of those cases, the calls were very imperfect expressions indeed, of the concurrence of the parishioners.

But although this is a part of the case attended with difficulty, and on which I certainly have at different times entertained different opinions, my fixed impression now is, that this course of decisions, as it is called, is not, when properly considered, sufficient to take off the effect of what I must hold to be the previously established practice, and to invalidate the rights implied in that practice.

In the *first* place, when one reflects on the latitude assumed by tribunals much more carefully composed than the General Assembly, a *series rerum judicatorum* is not to be rashly given effect to, as fixing the law, and still less as importing a surrender of a right, previously appearing to exist in that tribunal. *Secondly*, Considering the nature of the point decided in each particular case, and the kind of jurisdiction exercised in regard to it, I think it would be a harsh construction, indeed, to ascribe such an effect to that course of decision. The point involved in each particular appeal was not the absolute condition of what should form a good and valid call in every case. According to my understanding of the matter, the call or concurrence of the parish was exercised under the authority of the Church Courts, taking into consideration the circumstance of each particular parish. Each judgment, then, might perhaps be considered as a judgment fixing that a call, so inadequately signed, was not necessarily bad, and therefore absolutely inadmissible in all cases; but it went no further: and it certainly was not a judgment that a call so inadequately signed must in all cases be considered good. It fixed, perhaps, that the Church Courts were not bound, in all cases, to reject so defective a call; but it is a wide and most illogical step to conclude, that it imperatively bound them, in all other cases, to find that such a call was necessarily good. And unless so considered, the *series rerum judicatorum* does not touch the present question. And when we are told that these decisions proceeded from the opinion entertained by the leaders of the church in their day of the illegality of the requisite of a call, I confess I receive the statement with very considerable distrust. According to my notion of those proceedings, and I say it without the slightest disparagement of the eminent persons who took a part in them, the practice of admitting calls on such easy terms arose, not so much from their diffidence in the discretionary power of the church, in judging of calls, as from the exercise of that discretionary power, in a particular direction, best calculated to facilitate the admission of ministers holding opinions most agreeable to the ruling party at the time, and to exclude those of a different way of thinking. And lastly, I think the series of judgments, when strictly considered, tends most materially to support the pretensions of the defenders. Of that long series of judgments, nearly the whole

were pronounced in cases, in which the calls to presentees had been rejected by the presbyteries and the synods. Now, what was the course taken in those circumstances by those patrons and presentees,—not an appeal to the Civil Courts,—not an appeal to the Supreme Ecclesiastical Court, complaining that the condition of a call had been illegally superadded to the presentation,—but an appeal, praying that the Supreme Ecclesiastical Court would sustain the Call. And the proceedings had in the General Assembly in disposing of those appeals, were uniformly in accordance with those reasons of appeal. They were not disposed of as mere matters of course, by reversals of the judgments of the presbyteries and synod, proceeding on the notion, that a call or concurrence of the people was a mere matter of form. Inquiries were gone into on the circumstances of each case, and upon those circumstances, judgments were pronounced, whether right or wrong it is unnecessary here to inquire, finding, that, in the opinion of the General Assembly, those calls were sufficient, which had not been held satisfactory by the inferior Church Courts. When those judgments are viewed, then, in this, which, in my opinion, must be held to be their true light, they, so far from impeaching the rights of the Church Courts, constitute a course of procedure fixing the very points which are conclusive of the case in their favour : that, by the practice of the Church, acquiesced in and adopted by all parties, including patrons and presentees, and consequently forming a usage legally capable of explaining the Act of Queen Anne, a Call was an indispensable part of the ecclesiastical procedure in the admission of ministers ; and that the Church Courts were recognized by all parties concerned as the sole and exclusive judges of the sufficiency of such call or concurrence.—And this is confirmed by the Act of Assembly in 1782, declaring, that “ the moderation of a Call in the settlement of ministers is agreeable to the immemorial and constitutional practice of this Church, and ought to be continued.” But the strongest evidence of all on this point is to be found in that express reference to the *Call*, which is invariably made in the procedure preceding the ordination. One of the questions put to the candidate for admission to orders is, “ Have you used any undue methods, either by yourselves or others, *in procuring this Call ?*” And another, “ *Do you accept of and close with the Call to be pastor of this parish ;* and promise, through grace, “ to perform all the duties of a faithful minister of the gospel among this people ?” And the Call here can have no other meaning than the concurrence or invitation of the people. It cannot possibly apply to the presentation, of which the acceptance takes place at a different and earlier part of the procedure ; when the presentation is first laid before the presbytery. So that the

Call is not only uniformly required by the Church Courts as an indispensable part of the procedure in the admission of a minister, but is actually embodied in the most solemn part of the ceremony by which that admission is completed.

When I look, then, to the very general terms of the act of Queen Anne, directing how presbyteries are to admit,—at the principles immemorially held by the Church against intrusion, meaning by that, settlements absolutely independent of the concurrence of the people, at the constant practice, since the act of Queen Anne, of never dispensing with a Call, on which the ecclesiastical courts were sole judges,—when I look at the numerous instances in which presentees have been rejected on the ground of the insufficiency of the Call,—and find that in no one instance has there been any challenge by patrons or presentees in a civil court, either of such rejection, or of the form requiring a Call as a condition superadded to the presentation,—I cannot avoid the conclusion, that the requisite of some concurrence on the part of the parish, of which the sufficiency is to be judged of exclusively by the Church courts, is, by law, part of that form of the admission of ministers, according to which alone, presbyteries are bound to admit the presentees of patrons.

And if this be so, no difficulty can arise from the circumstance of the presbytery of Auchterarder having, in this instance, obeyed the enactment of the General Assembly in regard to Calls, without exercising any farther judicial discretion on the Call held by the presentee. Of course, the point on which the sufficiency of any Call, as evidence of the concurrence of the people, must depend, is the amount of the concurrence weighed against the expressed or implied dissent. And if the Church courts and the General Assembly, the Supreme Court, have the power of determining in each special case, what concurrence shall constitute a sufficient Call, the last body, which has also legislative powers in ecclesiastical matters, may surely enact and declare what degree of concurrence, the presbytery, the inferior court, shall or shall not adopt as sufficient. It may be a question, whether or not it was expedient for the General Assembly to lay down, prospectively, a general rule for all cases, instead of allowing the presbyteries to determine on the circumstances attending each particular Call which should come before them. But that is a matter with which we have nothing to do. It was one well deserving the consideration of the General Assembly before they declared the law; and I have no doubt that it was deliberately considered. The only point here is, whether, as between the Church courts and the civil rights of patrons, it was *ultra vires*. And I do not see how it could be considered *ultra vires* of the General Assembly to enact, generally and prospectively, that in all cases there should be exacted, something which they

had a right to exact, in every particular case which might come before them.

While giving this opinion, I am not conscious of ascribing to the General Assembly any higher legislative powers than they are generally, and, as I think, justly, understood to possess. I think they have legislative powers in matters properly ecclesiastical; and, for the reasons already given, I think that the Call is by law, attested by immemorial usage, a matter ecclesiastical; being part of the ecclesiastical form of the admission, and, in the great majority of cases, of the ordination of a minister. As such, I think the General Assembly has the power to regulate it to an extent, *bona fide*, consistent with the nature of that form, and the object which it was intended to answer. I hold them to have the power of regulating it, precisely as they have the power of regulating the qualifications of presentees; and that, although such regulations may limit in some degree the range of selection by patrons, I do not say that cases may not occur in which the one power as well as the other may be abused. If it were attempted by the Church courts, under the disguise of pretended regulations of either the one kind or the other, to defeat the rights of patrons, by requiring conditions palpably inconsistent with the object for which those powers were vested in them, the civil courts might be justified in disregarding those enactments. But I see no just cause for holding the present case to fall under this exception. Looking at the nature of the regulations enacted by the General Assembly, as enforced in this particular case, they appear to me to be clearly within the powers which the Church courts might have judicially exercised, and of which the General Assembly, therefore, might, in their legislative capacity, prospectively regulate the exercise. It is true they form a more rigorous standard, than that by which the Church courts had for some time previously, measured the sufficiency of Calls in the particular cases coming before them. But they contain nothing inconsistent with the obvious and only intelligible object of a Call, viz. that it should express, to a reasonable extent, a concurrence on the part of the parish. Above all, they do not go beyond what the Church courts might, in the exercise of their judicial discretion, have exacted; and, what is of more importance, might have exacted in this particular case. For it must always be kept in mind, that the question here is not, whether the General Assembly did wrong in passing the law, but whether wrong has been done to the pursuer by the application of the law to his particular case. In this view the whole circumstances must be taken into consideration. And I think it cannot possibly be disputed, that the rejection of a presentee, on the insufficiency of a Call, signed only by two resident heads of families, and expressly dissented from, by 287 heads of families out of 330, could at no period, even during

the utmost relaxation of the practice of the Church in this particular, have been held to be beyond the powers of the Church courts. But, besides, I do not think that the question of the legality of the regulations of the General Assembly properly arises in the present case. From the terms of the summons, from the narrative, the subsumption, and from the conclusions now insisted in, it appears to me that the only question that does arise here is, whether or not the pursuer is entitled to be taken on trial, and admitted as minister of the parish of Auchterarder, without any call or concurrence whatever? The affirmative of that proposition is truly the conclusion arrived at in the present summons, and is one which, for the reasons already assigned, I think, cannot be sustained.

I am sensible that it may be said, and has been, though not very distinctly said, in opposition to this view, that the question of the legality of a call is not here raised, and that the illegality against which the pursuer seeks redress is what is called the Veto, the rejection of the presentee in consequence of the dissents of the majority of heads of families. I have already explained my reasons for thinking that it is impossible to separate the dissent from the Call; that the dissent was only one of the means taken by the General Assembly to determine whether a Call should be sustained or not; and that the grounds on which the Veto was challenged in the summons, must apply to every rejection on the score of insufficiency of call, because every such case must be reducible to the veto of those who decline to concur. But, even admitting, for the moment, the ground of rejection taken in this way, to be the ground set forth in the summons, it would be impossible to reconcile it with the conclusion, except on the assumption of that very proposition respecting calls, which in the same breath is supposed to be waived. For if the rejection of the presentee is in this case to be disconnected from the consideration of the call, it follows that there is at this moment before the presbytery of Auchterarder, a call on behalf of the pursuer, the presentee, still undiposed of. Now I can understand that there might be two conclusions consistent with the supposition that the legality of a Call was not questioned in the present action. The summons might have concluded, either that the call should be sustained by the presbytery—a conclusion which, though consistent with the above supposition, would have been clearly incompetent, as touching a matter beyond the cognizance of the Civil Court; or it might have concluded that the presbytery should take the call of the pursuer under consideration, and upon that being sustained, take him upon trials, &c. But the present summons does neither the one nor the other. Although the fact is unquestionable, that, according to this view of the case, there lies before the presbytery of Auch-

terarder a Call still undisposed of, the conclusion of the summons is, that the presbytery shall at once take the presentee on trials, and admit him if qualified,—in other words, that they should take him on trial, and admit him independently of any call or concurrence on the part of the parish;—being the very proposition which is involved in the other, and, as it appears to me, more correct view of the summons, and which is negatived by the invariable and concurring practice of Church Courts, presentees and patrons, in the matter of the admission of ministers, since the passing of the act of the 10th of Queen Anne.

Before concluding, I may be permitted shortly to notice a matter which, though not entering strictly speaking into the law of the case, has been employed as a kind of argument *ad absurdum* against the view which I am inclined to take of this case. It has been said that, if the Call, as regulated by the Acts of the General Assembly, stands good, patronage must in future be a mockery and must substantially be extinguished. I think this is no more true, than the counter proposition asserted by those opposed to patronage, that such a right in the hands of a private party is necessarily destructive of all beneficial influence on the part of the parish, in the appointment of their pastor. I do not see the absolute incompatibility of the one existing in combination with the other. With great submission, it appears to me, that both of the parties who maintain those extreme views, assume that fallacious principle, which is sometimes laid down by certain speculators, in reasoning against the possibility of mixed or balanced governments, that, in the case of co-ordinate powers, the substantial exercise of the one is, necessarily, fatal to that of the other. It would be much nearer the truth to say, that there is no power which is not, one way or other, modified, and controlled by opposition; and that the whole system of government—of political administration—and of private business, is composed of a balancing of opposing influences, and a constant adjustment of seemingly adverse pretensions;—the practical effect of which in general, is not felt as an impediment, but, on the contrary, is highly beneficial in the conduct of affairs. The result is, not absolute opposition, but compromise; and, like that arising from the composition of different forces, the course is in general, one not in the exact direction, indeed, of either, but partaking of the tendency of both, and terminating in a point more happily placed, than that to which either acting separately would have led. Even considering the objectionable regulation here as a veto, we surely can be at no loss, in this country, for instances to show, that a veto does not, necessarily, lead to the extinction of those powers against which it *may* possibly be exercised. On the contrary, the conviction of the existence of such a check, only serves to guide the exercise of the powers, against

which it *may* operate, in such a way as to render the actual exercise of it unnecessary. I see no improbability in the supposition, that it might have so acted in the present case. I do not know any class of persons to whose prudence, discretion, and conscientiousness, such a check could have been more safely intrusted than the heads of families in full communion with the Church. I should have hoped that this check would not, in such hands, have been perverted into an instrument for defeating the right of selection legally vested in patrons. It might indeed have narrowed their range of selection; but it would have done so on the most honourable principle, and to the most beneficial effect—by raising the standard according to which they tried the merits of the candidates for their favour; and might thus, without destroying the right of patronage, have only tended to enlighten and purify the spirit in which that important right was to be exercised. And these are not merely empty speculations, for I understand from authority, on which I can place the most perfect reliance, that, though in some cases, and those of course attracting the greatest share of public attention, heats and differences have arisen in the settlement of presentees, the vast and overwhelming majority of settlements have been perfectly quiet and highly satisfactory. Patronage has not been extinguished; it has been exercised, and the mode of its exercise has been such as to place the right on the best of all possible grounds, the conviction of its utility on the part of those mainly interested—a ground much more likely to secure its efficacy and permanence than the most authoritative announcement of the legal rights of patrons.

I am certainly far from imputing any blame to the pursuers of this action, for the assertion of those claims which, I have no doubt, they conscientiously believe to be just,—a belief in which they are sanctioned by the opinion of a majority of the Court. But, holding the opinion which I do of the probable consequences of the regulations of the Assembly, contrasted with those which are now likely to follow, I cannot help expressing my deep regret that objects so highly desirable as the peaceable settlement of ministers, and the harmony between the Civil and the Ecclesiastical Courts, should have been disturbed, or even endangered by the thorny, the hazardous, and the most inflammatory questions, which have been inevitably raised in this action.

Saturday, March 3.

THE LORD PRESIDENT.—“ LORD MONCREIFF.”

LORD MONCREIFF.—My Lord President, This is a very uncommon case, and I think I may say it is absolutely without precedent in the records of this court. It raises in every view questions of the greatest importance: But, in the way it has been pleaded, those questions of jurisdiction, competency, and relevancy, which are necessarily raised by the summons and defences, have been rendered of tenfold more vital and momentous interest. For I confess it appears to me, that the various and contradictory theories to which the counsel of the pursuers have found it necessary to resort, in order to sustain so singular an action, would, if they had really any solid foundation, go far to annihilate all the substance of the fabric of the Church of Scotland, and all that has hitherto endeared it to the affections, and drawn to it the grateful respect and veneration, of the people of this land.

The question, whether it was in the power of the church-courts as by law established, to pass such an act as that which the General Assembly of 1834 transmitted to the presbyteries of the church, and enacted *ad interim*, and which in 1835 another Assembly, with the express concurrence of a great majority of the presbyteries returned within a single year, finally passed into a standing law, is certainly not new to me. It has been pressed on my attention in other places, and on various occasions, with great seriousness and solemnity. After very numerous overtures on the subject, and many directed to the total abolition of the law of Patronage, from the presbyteries and synods of the church, had been laid before the General Assembly, and after the tables of the Houses of Parliament had been covered with petitions on the subject, I was called upon amongst others known to have taken an active interest in the affairs of the church, to render such assistance by information or otherwise as I might be enabled to do, in the enquiry which proceeded from those petitions before a Committee of the House of Commons. Though feeling all the delicacy of the situation of a judge, when so called upon, I deem-

ed it my duty to comply with that request, from the deep conviction which I had formed, of the extreme inexpediency and danger of the measure of abolition demanded of Parliament, and my earnest anxiety that the real history, character, and position of the law of Patronage in Scotland might be fully understood. But, in doing so, I felt it to be necessary clearly to guard myself, that, on the one hand, I should not be understood to compromise the right of myself or any other judge to decline any such examination, in which questions of municipal law or on the construction of statutes might arise, and on the other, that I should not be understood, in any answers I might give, to deliver any judicial opinion, but to “have most fully reserved to myself the right of free and unrestrained judgment, upon argument and discussion, whenever “any such question should be raised before me judicially.” Under that protestation, all the humble aid which I could render, according to my conscientious opinion, was freely given for the preservation of the law of Patronage: But incidentally, I was also requested to answer to questions, concerning the powers of the church to enact any such ecclesiastical law, as the act which had previously been proposed, and has since been passed; and renewing my protestation, I did then with equal freedom express my opinion on that point, according to the best judgment which, on much reflection, I had then been able to form.

My Lord, I have now had the advantage (though I think rather unaccountably) of hearing this question as to the power of the church argued before me with the most consummate ability. I have given to it in private more study and reflection than I ever did to any cause since I have sat on this Bench. I have also listened with the most anxious attention to the opinions delivered by those of your Lordships who have already spoken; and now, with the utmost possible respect and deference to the opposite views taken of this cause, I find myself enabled and bound most conscientiously but firmly to declare, that I have as clear and as decided an opinion as I ever had on any question of importance presented for my judgment, or as I ever can have when so many of your Lordships differ from me, that the church *had* the power to enact the law which is *said* to be the subject of this action, and that the action itself is both incompetent and groundless.

It has been granted in argument, that this court has no jurisdiction to consider the policy or expediency of the measure. I must say, however, that, though the pursuers no doubt intended so to limit themselves, many parts of their argument were to my mind no way pertinent to the subject, except as directed against the rightness or expediency of it; and I am afraid that, even in the opinions of your Lordships, the strict line of distinction

may not have been entirely preserved. Perhaps I may not myself be able in all points to preserve it, however anxious to do so. But the concession is not in itself sufficient. Something more, and of much greater importance, must, in my opinion, be granted. For there may be a *constitutional question* strictly in *ecclesiastical law*, which is quite foreign to the jurisdiction of this court. There may have been,—I know there were,—different opinions entertained and expressed, concerning the constitutional correctness of the act, with reference to the law of the church, and the separate jurisdictions of its several courts. And I humbly think, that the great scope of the argument of the pursuers, except when it is directed to deprive the church of all power of legislation whatsoever, even in matters ecclesiastical, truly relates more to supposed difficulties in the ecclesiastical competency of the law, or the practical use of the principle laid down in it, than to the proper question, how far it is in violation of civil statutes, or an infringement on civil rights. But the distinction is plain, and of essential importance. If the church-courts were acting within their own competency, it is not *here* that any party can be heard to argue against the constitutional accuracy of the measure they have adopted. That argument was fitted for another place. I know that some of your Lordships think otherwise. But I must state it as a very important point in the opinion I entertain of the case, that we have no competency to consider any such question.

It may be right here to advert to the exact position, in which the act of Assembly stood, at the time when the sentence which is the cause of this declarator was pronounced. But first, let me make a few general observations. The law of Patronage is part of the law of this land; and undoubtedly the titles, by which it is held by an individual, confer on him legal rights. But the *right* of patronage is not a right of *absolute property*. It has been too much so treated; and I own, that, being sincerely of opinion that it would not be for the interest of the church or of the country that it should be taken away, it is always with regret that I hear it spoken of as a mere subject of *patrimonial value*, which may be sold to the highest bidder, and bought on speculations of personal interest, like any ordinary article of merchandise. It is, no doubt, true as matter of fact and law, that a right of patronage may pass from one person to another by sale or gift; but that is one very strong reason for keeping it constantly and *strictly* in view, that the right can only so pass, and must always be held, according to its true nature and legal character, and with all its qualities and conditions. The patron has no property in the *fruits of the benefice*, and he cannot legally derive the smallest fragment of personal benefit from any exercise

of the right of presentation. It is but a *trust* in his person,—a *trust* the most *sacred and solemn* with which a human being can be invested,—a *trust* for the *benefit of the people*,—a *trust* for maintaining the religious interests of the community, on which their present happiness and their eternal welfare depend. Need it be wondered at, then, if, in the original foundation, or in the progress, of such a church establishment as that of Scotland, built as it was on broad principles of freedom, and whose main aim ever was the instruction and edification of the people, such a trust-right, in its very nature exposed to abuse, should, by the laws equally of the church and of the state, have been subjected to various checks and restraints, conditions and qualifications, in the exercise of it, for securing its faithful and beneficial use for the great end in view? It would be expected beforehand that it should be so; and it is certain that the right is subject to many such restraints. It is restrained by the powers of admission and ordination exclusively vested in the church courts—by the power given to them of judging of the qualifications and fitness of the person presented—by all the laws against simony—by the acts which limit the time of presenting—by the qualifications attached to the patron, and the oaths he must have taken,—and by other qualities—all directed to the object, that the trust *for the people* shall be *duly executed*.

Now it appears, that, previous to the General Assembly in 1834, an impression, which had never ceased to exist in Scotland, had become vivid and prevailing, that one of the constitutional and most essential safeguards against the undue use of the right, though maintained and constantly observed in form, had been reduced by practical operations to nearly a dead letter; that many evils had in consequence been brought upon the church; and that it ought to be revived in its full spirit, and brought into a state of definite and active efficiency. I see that an opinion is entertained, that no evil had been produced, but that, on the contrary, the series of decisions spoken of had conferred great benefit on the church and on the country. One authority in the *Life of Dr. Robertson* has been referred to, bearing the name of an eminent professor, but which, in the particular part quoted, as explained by Lord Gillies, was not written by him, but by another very eminent and excellent person, Principal Hill; and, though I bear to his name also the most sincere respect, it cannot but occur to every one, that his authority cannot be exactly the same on a subject, in which all his opinions, associations, and prejudices, were on one side, as it must be acknowledged by all men to be in the much higher departments of his theological and literary labours. But on this point, as on many others, another treatise, which was republished by me in 1833, has been much referred to. My

Lord President, I cannot but be deeply affected by the kind and feeling manner in which your Lordship was pleased to express yourself in regard to the author of that treatise. I should be myself destitute of all honourable feeling, if I were not profoundly sensible to the value of such a warm tribute of respect and affection towards his memory, coming from your Lordship, towards whom, permit me to say, I always look with the truest reverence and attachment. But will you allow me most respectfully to suggest a doubt, whether, in such a legal discussion as that we are now engaged in, more use has not been made of the various parts of that pamphlet than the nature of it will altogether authorise. It was originally published as an appendix to the Life of Dr. Erskine, for the simple purpose of enabling persons, who might be strangers to our ecclesiastical institutions, to understand some passages in the Life. The author states that it was a mere sketch, written amidst many avocations, and that he was sensible that there must be many defects in it, both in the *substance* and in the *composition*. It was republished by me in a separate form in 1833, with that explanation in the preface. In doing so, I had two objects. I thought it might have some tendency to lessen the agitation which, from obvious causes, had then begun, on the subject of the abolition of the law of patronage itself; and I hoped also, that it might be useful in enabling the members of the House of Commons, on whom the numerous petitions presented were forcing the consideration of the subject, to understand something of the constitution and history of that church, on which they were required to legislate. I believe it in some measure answered both these ends. But it never would have occurred to me, that it could be relied on in point of accuracy, either in the details of all the facts, or in the precision of language to be desired in every thing which may be safely appealed to in a legal inquiry: Several mistakes in facts were pointed out by the Dean of Faculty: I could mention others: And I am firmly persuaded, that, in the most important of the passages which have been quoted, there is a manifest looseness of expression, which makes them convey ideas, which the author *could* not have entertained or expressed, if he had been considering with the care necessary the precise state of the facts, and the full import of the words used by him. But still less could I have imagined, that the gentle and honourable candour, with which the author has expressed himself, in regard to a controversy, *in which he had himself been engaged*, but which he believed to have been for a long period sopited by the circumstances explained by him, could be mistaken for a surrender of the opinions *which he had held all his life*, or construed into an approval of the proceedings of the eminent men to whom he had been almost uniformly opposed, or into an acknowledgment *that no evil consequences had arisen from*

them. If any such inferences are drawn, they are not correct, as the pamphlet itself shews. Allow me to say,—in which he also joined,—that the men who took the lead in that struggle, concerning the necessity of a real call by the people, Dr. Dick, Dr. Macqueen, Dr. Erskine, Mr. Freebairn, Mr. Stevenson, Mr. Andrew Crosbie, and others, were no mean men, no weak and ignorant bigots. But, since so much has been said of the pamphlet from the bar, and by some of your Lordships, I hope that even I may be permitted to read (since no one else has done so,) the following sentences, both in vindication of the author's consistency, than whom no man ever lived who was more opposed, in the knowledge of all Scotland, to the settlement of any man in a parish who was not reasonably expected to be acceptable to the people; and because they have a most important bearing on the point which has led me into these observations.

After explaining the progress of the controversy, he says, at page 36, “The zeal of the people was irritated, and at last exhausted, by processes in the Assemblies, so long protracted, and so uniformly unsuccessful. Their opposition to presentees did not become less frequent, or less difficult to manage at home. But the people became gradually less inclined to bring their opposition to the Assemblies. Before Dr. Robertson retired from the management of church affairs in 1781, there were, in comparison, few cases of disputed settlements brought to the General Assembly.” At page 87, he says, “Whether it was originally expedient to have adopted the system; *whether the system was at any time agreeable to the constitutional laws and usages either of the Church or of the State*; and whether the support given to it by his Majesty's government, under every successive administration, was *dictated by sound policy, are quite different questions.*” Then the following passages occur at pages 89, 90, “The language of the majority in Assemblies at this time universally was, that the secession from the church, instead of increasing, was on the decline; and that the superior character and talents of the established clergy was gradually weakening its resources, and would ultimately exhaust them. Experience has not verified these sanguine expectations. At the distance of a few years after Dr. Robertson retired, the people, disgusted with unsuccessful processes before the Assembly, relinquished the plan of their predecessors, and came seldom to the Assembly with appeals from the sentences of the inferior courts, appointing the settlement of presentees whom they resisted. But they began to do more quietly, or with less observation than formerly, what was not less unfriendly to the establishment. In ordinary cases, they *now* leave the church courts to execute their sentences without opposition; and set themselves immediately to rear a

“seceding meeting-house, *which very often carries off a large proportion of the inhabitants of the parish.* The bustle in Assemblies is in a great measure over; or a disputed settlement no longer creates any serious interest or division in the church-courts. *But the silent increase of seceding meetings has gradually weakened and contracted the influence of the Establishment on the general population.*”

The author elsewhere explains, that the Secession, which consisted originally of only *eight* churches, had increased to 360, at the time he wrote in 1838.

This is the state of quiet repose, which the prevailing views brought about. I agree perfectly, notwithstanding, in what has been said of the concluding passage of the pamphlet, that, in spite of all evils and defects, the practical benefits conferred on the country by the Church of Scotland had equalled, if they had not surpassed, those of any church in christendom. But still the evils were very serious. And I may be allowed farther to mention, that, long after the Life of Erskine was published, and after the author's death, another agitation arose, of which he could have had no conception, directly connected with the subject of the last passage I have read. He had, in a spirit of Christian liberality, which I believe was fully appreciated by many of the Secession Church, suggested, that they might all be again united to the Established Church. Unfortunately, other views were taken up by a great part of that body after his death. It would be wrong to say a word on such a subject. But no man can doubt, that neither the Church, nor the people of the Church, could be indifferent to it. As mere matter of fact, it necessarily directed attention to the subject of the calling and inducting of ministers, and revived some of the old questions on that subject. It was in these circumstances, and while the Committee of the House of Commons on the law of patronage was yet sitting in London, that the General Assembly of 1834, far from meeting with *no complaints*, having their own table covered with *overtures* from very numerous presbyteries and SEVERAL ENTIRE SYNODS, pressing earnestly for some fixing measure on the subject of the moderation of the calls, then necessarily entered on the serious consideration of that part of the regular, constant, and legal process of the admission of ministers, which consists in, and is known in all the records of the church by the name of, “*The moderation of the Call* ;” and being fully satisfied of the expediency, and indeed the necessity, of some distinct and clear law being passed on the subject, adopted the overture which was then transmitted to presbyteries, and being enacted *ad interim*, constitutes the act under which the presbytery of Auchterarder proceeded in this case. But it is well worthy of notice, that so strongly was it felt, that there was a *necessity* for some declaratory

enactment on the subject of the settlement of ministers, that the only motion, which was set against a similar overture in 1833, consisted in a resolution for a declaratory act, with various regulations, distinctly directed to a *change* of the existing practice, proceeding on an express avowal by the mover, that the former decisions had gone too far; which resolution was to be converted into a declaratory act of the church, by the authority of a *single Assembly*: And it is farther remarkable, that, in the following Assembly, an approval of the relative regulations constituted the motion, which was set against the overture of 1834.

I do not at present enter into any discussion of the terms of the act of 1834. The principle of it was simply, to declare what those who framed it believed to be a fundamental law or principle of the church in the admission of ministers, and then to make a definite provision *for the instruction of presbyteries*, which was thought to be sufficient for securing effect being given to that principle, and fully believed not to be in any respect inconsistent with the just exercise of the right of patronage. Whether that measure was wise or not—whether it was as well conceived or expressed as it might have been,—are not questions which can be discussed here. There are many considerations affecting them which would be altogether unsuitable in this place; and I shall not allow myself to be excited by the many hard, and, in my sober judgment, most unjust things which have been said, so far to depart from my proper judicial functions, as to enter into any such discussions. I may be permitted simply to observe, that I think the principle of the act has been much misapprehended, as if it were a very violent measure against the rights of patrons, whereas, if it were proper in this place to enter into such a question, it could be easily shewn, and has been proved by experience, that it was in fact a much milder form of giving definite effect to the call, than if, assuming that part of the undoubted law of the church not to be abolished, it had been resolved to require any positive *quantum* of direct *concurrence* by the people, or members of the congregation.

But I now wish to observe, that though,—the act having been passed *ad interim* by the Assembly 1834,—the Auchterarder case arose under it while it so stood, and must be judged according to it, wherever there is competency to judge of it, the state of the matter was very different when the sentence of the presbytery rejecting the presentee was pronounced on the 7th July 1835. By that time, the overture had passed the ordeal of the whole church, had been approved of by a great majority of the presbyteries of the church, and had been finally passed into a standing law by the General Assembly of 1835. Your Lordships will perceive, therefore, that what you are required to consider—not indeed by

the summons, which makes no allusion to it, but by the argument of the pursuers—is, not the act, or the views of any individual or number of isolated individuals; not any hasty decision of any church court in a particular case; not even a declaratory act like Dr. Cook's of 1833, proposed to be passed by a single General Assembly; but an act finally passed into a law of the church, by *the whole body* of the Church of Scotland, in the most regular, solemn, and deliberate manner, under all the sanctions of the barrier act, and which every presbytery within it is imperatively bound to obey. Let the pursuers make as light of it as they may, (I am sure your Lordships cannot do so,) it is a very serious matter, for this court to interpose to declare such a law itself in matter ecclesiastical, and the act of a presbytery in obeying it, to be **ILLEGAL**. This is perhaps even more serious than it may at first sight appear to be. For, though it cannot of course affect any of your Lordships in the judgment which you may think it your duty to pronounce, it may be right to put it in the view of the Court, that the act in question, having passed through the operation of the barrier act, cannot be altered by any act of a single Assembly, or otherwise than by an overture transmitted to presbyteries, and afterwards enacted by another Assembly.

But, my Lord, it has been well said, that this is merely an *action at law*, however large and interesting the questions raised in it may seem to be. And I apprehend, that in it, as in all cases, it is our duty to consider it strictly as such, and to give attention to all the difficulties with which the pursuers may, by their own conduct, or by the form of their summons and pleadings, have encumbered it.

And this brings me to take notice of what—if any case on the act of Assembly is before us at all, of which presently—I think ought to be treated as a preliminary question, and which, to my mind, is far from being so simple and easy as the pursuers have treated it.—Indeed, I do not think that the full force of it has yet been attended to.—I mean the objection, personal to the defenders, that they *acquiesced* in the *legality* of the *presbytery proceeding on the act of Assembly*, and are barred from now maintaining the point, which is said, though erroneously, to be taken against the presbytery by the declaratory conclusion to which our attention is *at present confined*. I have doubts, indeed, whether either this plea, or any question on the act of Assembly at all, is properly in the record. But if the plea on the *illegality* of the *act* is before the Court, the objection of *acquiescence* in it must be open, and is of material importance.

Observe the terms of the summons. It proceeds on an assumed obligation on the presbytery *to take the presentee on*

trials, and, if found qualified on such trials, to admit him; and on the fact stated, that without doing so they rejected him on the ground of a veto of the parishioners: And this is attempted to be sustained by an *argument* (not in the record, as I think,) to shew, that the act of Assembly under which the presbytery proceeded was illegal. Now, look at the minutes of the presbytery. The presentation, with the presentee's *acceptance*, his *license*, and other necessary papers, were at the first meeting produced by Mr. Hope Moncreiff as agent of the patron. According to uniform practice, it was received, and appointed to lie on the table till next meeting. The minute of the second meeting, after mentioning that Mr. Moncreiff appeared and produced other papers, proceeds thus:—"The presbytery taking into consideration that the late Rev. Charles Stewart, minister of Auchterarder, died on the 31st August last, and that the 23d regulation of the interim act of the late General Assembly anent Calls, intimates that all cases in which the vacancies have taken place after the rising of said Assembly, shall fall under the operation of the regulations and relative act of Assembly anent Calls; FINDS, THEREFORE, THAT THEY MUST PROCEED TO FILL UP THE VACANCY IN AUCHTERARDER, ACCORDING TO SAID ACT AND RELATIVE REGULATIONS." Then it bears, that all the necessary papers being produced, the presbytery found themselves prepared to sustain the presentation and appoint a day for moderating in the call—that they appointed Mr. Young to preach in the church of Auchterarder on two successive Sundays, and intimation to be made, that the presbytery would meet in the church "on the first Tuesday of December next, being the second day of that month, TO MODERATE IN A CALL in the usual way to Mr. Young to be minister of that parish," &c. After this the minutes bear—"In ALL which sentence of the presbytery Mr. Moncreiff ACQUIESCED, and TOOK INSTRUMENTS in the clerk's hands."

Here observe, (1.) *The presbytery expressly resolved to proceed on the act of Assembly.* (2.) *They did proceed on it expressly.* (3.) *They appointed the presentee to preach twice.* (4.) *They appointed a specific day for moderating in the call.* (5.) *In ALL which sentence of the presbytery Mr. Moncreiff ACQUIESCED, and took instruments, &c.*—Did the *patron*, then, not *acquiesce* in the resolution of the presbytery *to proceed on the act*? He most decidedly did. Yet he finds it *necessary*, in this summons, to set forth the very proceedings in which he so acquiesced—and in doing so *to omit the material part*, not daring to state it as having been *ultra vires* or *illegal*. If he founds on the terms, "*so far sustains the presentation*," &c. he acquiesced *expressly* in *that*. It is a very trifling criticism. The presbytery mistook the meaning of the instruction, and put the words

in their resolution—the meaning evidently being merely, that if *all the necessary documents were there*, the presbytery should sustain the presentation, and appoint the moderation of the call. It is trifling to found any thing on such criticisms.

The *presentee* preached as required. A *mandatory* for *him* appeared at the meeting for moderating in the call. And the patron's factor acted for *him*. A call, which I believe to be in the form commonly used there, was produced, and it was signed by the factor and by *two heads of families*, in a population of 3182. Did either the patron's factor, or the presentee's mandatory, object to or protest against the *legality* of proceeding on the act of Assembly? They found it *necessary* to state in the summons and record that they *did*. But it is not so. They objected to the *roll*, as not made up in *terms* of the *regulations*—thereby *founding on the act*; but they made no objection to the *legality* of the act itself, or of the presbytery proceeding on it. They then appealed to the synod, and afterwards to the General Assembly, on the same ground *solely*, that the roll had not been made up in the manner prescribed. They argued it largely in the Assembly on that single ground. The Assembly having affirmed the judgment of the presbytery, the case went back, and the presbytery *rejected* the presentee.

Mr. Young appealed to the *synod* (apparently on good grounds), still *proceeding on the act*. But he afterwards *fell from his appeal*. All this time, not a word of *illegality* in the act, or in the resolution of the presbytery to act on it, had been spoken. When all was over, a *notarial protest* was served, and then this action was raised.

I think it a very strong case of *express acquiescence*, specially in the act of the presbytery in the meeting of 27th October, *resolving to proceed in the case under the law of the Assembly*. It is not at all saying, we shall first see if the case is within the act. It is *resolved* by the presbytery that it *is* within it, and *that is acquiesced in*; and in all the future steps there is not a whisper of objection. And yet, the whole theory of the argument now is, that the pursuers *could* THEN have applied to this Court. No wonder that Mr. Young did not object to the legality of the act of Assembly. For I read in Dr. Hill's Book of Practice, p. 45, the questions which he solemnly answered in the affirmative, when he obtained his license, without which, it is singularly admitted, he could not be qualified to *accept the presentation* at all; and one of them is in these words—"Do you promise that you will *sub-ject yourself to the several judicatories of this church*, and are *willing to subscribe to these things*?" No one can be surprised, that Mr. Young, who must have solemnly answered that question in the affirmative, did not, either in the Presbytery, or in the

Synod, or in the Assembly, object to the *legality* of the act 1834. But I should not perhaps attach so much importance to this objection, if I did not think, that the mode of proceeding adopted by the pursuers goes deep into the competency of the action as laid, and was, besides, very unfair *in its substance*. When the proceedings began, and the express acquiescence in the validity of the act took place, it was but an *interim* act. The presbytery were bound to conform to it, if they saw no legal objection. None was stated; they resolved accordingly; and their resolution to do so was *expressly acquiesced in*.

Now, was it fair to the people so to acquiesce, if all the time such an action as the present was contemplated? If apprised of such an intention, they might have taken a different view of the subject, rather than go into discussions which must keep the parish vacant for a long period; or they might perhaps have taken their ground on Mr. Mackenzie's hint, on the defect of the positive *concurrence*, and tried the case separately on that footing, by taking *that* to the Assembly 1835, *with the protest against their act*. Was it fair to the presbytery, who were *bound* to act as they did, but who, if aware of the objection, might have gone by reference to their superiors for advice? But most of all, was it fair to the church at large, and specially to the General Assembly 1835? The church in the presbyteries were then (October 1834), *only considering* the *overture* transmitted, and were to report to the Assembly 1835. The Assembly 1835, on the returns, were still entitled to consider the whole merits of the act. In that Assembly, this very case was pleaded to them by the pursuers on an *assumption* and *admission* of the *legality* of the act; and, while they decided it, the same Assembly, having the concurrence of the presbyteries, *finally passed* the act, when as yet the pursuers had intimated nothing of any meditated proceeding in the civil court. What the Assembly might have done, if such a case had been fairly presented to them, it is not for me to conjecture. Your Lordships seem to think that they should stop in such a case. Was it fair to deceive them into a belief of acquiescence, and deprive them of that power? I am, therefore, strongly inclined to think, that the objection of acquiescence has much weight in it, and has received no satisfactory answer. But the fact bears also on another important point.

I proceed now to enter into the merits of this momentous, and, in the way it has been argued, most complicated case.

It appears to me, that the questions are, 1. Whether this Court has jurisdiction, with reference to the *conclusions* of the *summons*. For I think it impossible to consider *any* question of jurisdiction correctly, apart from the conclusions of the summons. To attempt

this is an ingenious way of avoiding the real difficulty in the case of the pursuers. The question, whether this Court has jurisdiction or not, must depend on *that which we are asked to do*, not on any thing which the Court might do in *another* case, or in this case *differently placed* before us. 2. Whether if the summons, in the declaratory conclusion, presents a case in which the Court *may* have jurisdiction, the facts of the case itself are such as to bring it within such jurisdiction. These two points may probably seem to embrace the whole substance of the cause. But though I apprehend, that the question concerning the *power* of the General Assembly to pass the act of 1834, with reference to any civil rights alleged to be involved, cannot with any propriety be separated from the question of jurisdiction, yet it may, for the sake of clearness, be stated as in some sense a *third* head in the discussion, Whether the act of Assembly was so *ultra vires* of the church courts, as to render the sentence of the presbytery illegal.

1. Though I am well aware, that it is impossible fully to appreciate the weight of the objections to the jurisdiction of this Court to try any question under the conclusions of the summons directed against the presbytery of Auchterarder, until the argument presented to us in detail has been considered, I own it appears to me, that, if it were not that the real object of the pursuers is, evidently, not so much to try the merits of this particular case, as to endeavour *indirectly* to obtain a judgment of the Court on the supposed excess of power involved in the act of Assembly, the case might be brought to a short issue upon the bare reading of the summons.

The plan of it is to set forth the acts 1592, c. 116 and 117, and the 10th Anne, c. 12; then the terms of the presentation, and the license, and other documents produced to the presbytery; after that, the presbytery's deliverance sustaining it, and appointing the day for moderating in the call; then the proceeding on the 2d December 1834, when the dissents were received, and on the 7th July 1835, when the presentee was rejected. It next states, *that the said judgments of 2d December 1834, and 7th July 1835, were ultra vires and illegal, in so far as, though, by the laws and statutes above libelled, the presbytery were bound and astricted to make trial of the qualifications of the pursuer, &c. and were not entitled to abandon their duty as a Church Court, to judge of and decide on the qualifications, &c. or to devolve that duty on others,—and though if, after examination, he was found qualified, they were bound and astricted to admit and induct him,—yet, nevertheless, notwithstanding that the pursuer is duly qualified as a licentiate, &c. and though no objections were stated, the presbytery refused to take him on trials, and to pronounce judgment on his qualifications, or to admit him, but have reject-*

ed him without trial, or taking cognizance of his qualifications, &c. expressly on the ground, that they could not do so in respect of a veto of the parishioners,—*in all which they have exceeded their powers*, &c. and acted illegally, and to the prejudice of the pursuer. Then come the conclusions to the same effect, “That the presbytery of Auchterarder, and the individual members thereof, *as the only legal and competent court to that effect by law constituted*, were bound and astricted to make trial of the qualifications of the pursuer, and are still bound so to do; and if in their judgment, after due trial and examination, the pursuer is found qualified, the said presbytery are bound and astricted to receive and admit the pursuer, as minister of the church and parish of Auchterarder according to law: That the rejection of the pursuer by the said presbytery, as presentee foresaid, without making trial of his qualifications in competent and legal form, and *without any objections having been stated to his qualifications, or against his admission as minister of the church and parish of Auchterarder*, and expressly on the ground that the said presbytery cannot and ought not to do so, in respect of a veto of the parishioners, *was illegal and injurious to the patrimonial rights* of the pursuer, and contrary to the provisions of the statutes and laws libelled.”

I beg leave to ask, by *which* of the statutes libelled is it, that the presbytery are bound and astricted to make trial of the presentee's qualifications? As it seems that, in this cause, nothing but *express statute* will avail any thing, this is surely a relevant question on such an *express libelling*. Not one of the statutes says a word of such a thing. If the presbytery are bound to go into any trials or examination, it is solely by the *ecclesiastical laws*. The sole power of examination and admission is given to the Church by the statutes, and the pursuers say that they are obliged to receive and admit any qualified person presented. But there is no law which obliges them to any particular mode of forming their judgment of his qualifications, except the laws and directions of the Church given from time to time. Can there be a doubt, then, that this first demand in the summons, for a decree, *finding the presbytery bound to take the pursuer on trials, is in matter purely ecclesiastical*? Observe that the summons does not once mention the act of Assembly 1834, nor even the judgment of the Assembly in this case in 1835. Lay these things aside, then, for a moment, and take it as in a common case before the act. Could any patron come to this court, to ask decree to ordain the presbytery to take his presentee on trials? Or if a presbytery proposed to admit a man without taking him on trials, and had refused to do so, could the heritors or parishioners come to this court for a judgment to compel them? Quite plainly, in both cases, the ap-

peal must be *to the superior church courts*, the whole matter of *qualification and admission* being confessedly *ecclesiastical*. But this is precisely the case stated in the present summons; for it bears no relation at all to the act of Assembly; and thus the first and leading *demand* in the conclusion is, as plainly, a demand against the presbytery *in matter ecclesiastical*, to which *no* civil statute obliges them, as any one thing which it would have been possible for the pursuers to conclude for. I know that there is something more in the subsumption, and also in the conclusion, and to that I shall presently advert. But there is another even more vital difficulty in this part of the case, which will bring out still more clearly the utter incompetency of the whole summons.

It will be observed, that the pursuers do not, by the summons, complain of the appointment of a day for *moderating in the call*. In making it, the presbytery, assuredly, acted strictly within their ecclesiastical functions: But, as surely, *something* was to follow on that appointment, before they could be in a situation to take the presentee *on trials*. He had, in the first place, to preach on two Sundays in the church. I suppose the pursuers do not complain of this order, or pretend that your Lordships can take any cognizance of it? It was the common practice that he should preach at least once, before the Act anent Calls existed. Then, for what purpose was he so to preach? It must have some meaning; and there can be no other meaning in it, but that his *gifts as a preacher* should be known to the *people before the meeting for moderating in the call*. Well, then, he preaches, and the call is presented for signature. It is signed by the patron's factor, that is, by the pursuer, Lord Kinnoull—and by *two heads of families*, the *designation* of persons which the pursuers' counsel would exclude from all concern in it. But the pursuers actually make it part of their argument, that the presbytery *gave no deliverance on the call*; and two of your Lordships, rather unaccountably to my mind, as their views seem to extinguish the call altogether, insist also that the presbytery were *bound to give a deliverance on the call*. I think that they did so in due time. But why is there nothing *in this summons on that point*? It is not stated, that the pursuer has *any call*, or that the call was moderated, or that the presbytery *refused to give judgment on it*. But is it not manifest, that, supposing the presbytery to have been wrong in all that they did after so satisfactory a subscription of the call, and that it could belong to this court to put them right, the process of induction *must still begin where it stopt*, viz. in the meeting for moderating in the call; and that the first thing to be done would be to *sustain the call*, or give *some judgment* upon it. Beyond any possibility of doubt, according to all ecclesiastical practice, ancient or modern,

until the call be sustained, the presbytery CANNOT take the presentee on trials. He was not even present at the meeting for moderating in the call; well knowing, that, though the call had been the most unanimous and harmonious possible, he could not have been taken on trials till another meeting. But the summons slurs this all over. If there were any competency in it, it ought to have concluded that the presbytery were *bound and astricted to sustain the call, and then* to take the presentee on trials. If the pursuers were to prevail in their action, without a summons adapted to the case, that is what must still take place. If they had prevailed in their appeal to the General Assembly, that would have been the inevitable result, unless the Assembly, as the Superior Church Court, had taken that matter into their own hands. But your Lordships, I presume, will not take upon you the duty of *sustaining the call*, or disposing of it in any manner.

We see very well, *why* there is not a word of this in the summons. There are two reasons. One is, that, in the difficulties of the case of the pursuers, they are exceedingly desirous of convincing us that, in the process of induction, there is *no such thing as a call*, and would very willingly have it discarded from all consideration. That this will not do, if any regard is to be paid to the established order of proceeding before the act 1834 was heard of, is manifest. But the other reason for avoiding all mention of the call in the summons is, that it would have presented too manifestly the absolute incompetency of the judgment demanded of this court—betraying too palpably the truth, that they require us to deal with things which *all men must hitherto have acknowledged to be purely ecclesiastical*.

Is it not, then, a *matter ecclesiastical*, to say that the presbytery are bound to take the pursuer on trials, while yet the summons discloses that no judgment sustaining the call has been pronounced, but contains no conclusion regarding it? The pursuers would scarcely maintain—I had thought it clear that they should not be listened to if they did—that it would be within the competency of your Lordships to determine, that *no moderation of a call* is necessary or LEGAL in the process of admission or induction. That would be rather too plain an encroachment on the province of the church. But the pursuers have not attempted it. At all events, they acquiesced in *that*; and they *raise no case against it in the summons*. There is *no such question before the Court*. It is but too plain, therefore, that the whole scope—the marrow and substance—of the summons is and must be in matter ecclesiastical, because it could only land in a thing not concluded for, but which is clearly ecclesiastical—judgment upon the call, or for moderating in the call, according to the appointment made, and the fixed law and invariable practice of the church.

What remains of this summons? Assuming that the presbytery had refused to take the pursuer on trials, and that judgment may be obtained finding that they are bound, without any previous proceeding, to do so, it farther concludes for decree, That the *rejection* of the pursuer as presentee, without making trial of his qualifications, and without *any objections* having been stated to his qualifications, or to his admission as minister of Auchterarder, and on the ground of a veto by the parishioners, was illegal. What is to follow from this we are not told, except in some conclusions as to the stipend, *which are not now in discussion*, a point which I understand to be agreed. But observe, that *nothing is here said of the act of Assembly 1834*, or of any proceeding of the Assembly. The pursuers at once assume, that no objection was stated, and yet inform us that it was in respect of what they call a *veto* by the parishioners, that the presentee was rejected. The objection evidently was, that a majority of the male heads of families in communion with the church having dissented from the call tendered to the congregation, there was no sufficient call, and the presentee was therefore not fitted to be a useful minister in that parish. Some of your Lordships may think this very wrong. That is not the question. But, supposing that any presbytery had done the same thing before May 1834, *would they not have been in the exercise of an ecclesiastical function?* And must not the appeal of the presentee, if dissatisfied, have been to the *superior church courts?* It would just have been the common case, only presented in a very strong form in favour of the people, which occurred so frequently during many years in the history of the church; in all of which the redress sought was uniformly in the General Assembly. And I apprehend, that not one case has been or can be pointed out, in which this court ever interfered in that question. Whether the superior church court would have been bound, in its merely *judicial* capacity, by the previous decisions, or whether those decisions would have ruled the case, is not the question. But it is manifest, that that is the very case which here occurs. I speak of the case *in the summons*. In that instrument, in which the character of the action, and the competency of its conclusions, must be exclusively found, there is no mention made of any act of Assembly. Nay, there is a *studious avoidance* of all allusion to the act of 1834, insomuch, that, even in stating the proceedings of the presbytery, every thing that could disclose the existence of such an act is carefully suppressed. It seems to have been felt, that it would have too strong and too direct an exhibition of incompatibility, to ask this court to sit in judgment to *reduce* an act of the church, passed by one Assembly, confirmed by the presbyteries, and finally ratified by another General Assembly. This, at least, would have been a *novelty* in jurisdiction, for which the pursuers were not pre-

pared ; they designedly shrunk from it in the summons ; and they followed the same course in making up the record. And yet what is the issue which they have argued ? They have throughout put it, not on the case in the summons, of the *presbytery* having *simply acted as there stated*, but on the existence of an act of Assembly *not therein alluded to*, and the alleged illegality committed by the Assembly, not here as a party, in *passing* that act. But if the real intention was to obtain a judgment annulling the act of Assembly, I may ask, Why is not the *corporation* spoken of called, to hear and see their *bye-law reduced* ?

Now, though I intend to consider fully all that has been stated on that subject, I think it of the last importance to observe, that, in my apprehension, there is *no such question* brought before us by this summons. With all deference, your Lordships *cannot* on this summons decide any such question, as whether the act of Assembly 1834 was within the powers of the church or not. Try to do it in *direct words*, and you will find it to be impossible. It is not said that the presbytery acted by any such authority. The pursuers would not state *that* in the *summons*. And thus the case there presented is the simple issue, whether the presbytery did right in rejecting the presentee, on the ground alleged in the summons,—an issue of the most common and clear *ecclesiastical* character.

The pursuers may possibly say, it would have been in vain to appeal to the Assembly, because the act would have made it imperative to decide against them. *Can I find that in the summons ?* It is *carefully excluded* from our *knowledge*. It may not be true. For I rather think that there were good grounds of appeal, from an irregularity in the proceedings of the presbytery, if the appeal had been followed forth. But the question is not, whether they could have appealed with effect or not ; but whether *the case*, AS STATED IN THE SUMMONS, *does not present an ecclesiastical cause*,—an ecclesiastical *proceeding*,—an ecclesiastical *question* ? I am clearly of opinion that it does, and that, as the summons is laid, there is nothing of which this court can take cognizance. Indeed, if it could be held otherwise, there are hundreds of questions, which have occurred in the settlement of ministers, and in other purely ecclesiastical transactions, which might with equal propriety be made the subject of suits in this court. On the principle of this summons, it is impossible to conceive any thing which might not be made the subject of a civil process, however properly it fell under the jurisdiction of the church courts.

It may possibly be, that the pursuers mean something by their summons which they have not said. Perhaps I may think that it is not a specimen of the very finest legal style. There is no help for that. I believe, however, that the strange, and in my opinion incompetent, shape in which, after an endeavour to amend its first

form, it appears, is chiefly to be ascribed to the *real difficulty* or *impossibility* of presenting the case truly meant to be raised, in *any* shape which would not have forced upon the Court still more palpably the total want of jurisdiction to try it.

This summons is liable to other objections of a serious nature, as leading to no intelligible end, in so far as it is now insisted in against the presbytery. And the whole action is exposed to still more important objections to its competency, in respect of jurisdiction, when we are required to consider the case on broader grounds than the summons presents. But, for the reasons now stated, I am, in the first instance, of opinion, that there is no case raised by that summons, on which it is competent for this court to pronounce *any* judgment.

2. I come now to the *second* question which I have indicated, namely, whether, if the objections to the jurisdiction arising on the summons by itself could be got over, the facts of the case, as in any way disclosed, are such as to give such jurisdiction.

It is very evident, that the *record* on the part of the *pursuers* in the condescendence makes no change on the state of the case. It is still placed solely on the actings of the presbytery, as insulated and unconnected with any act of Assembly, or deliverance of that higher court. So far they preserve consistency. Apparently carried away by some notion of extraordinary subtilty, their idea seems to have been, to try the question of the validity of the act of Assembly, by concealing from the Court that their action had the least relation to it. There is something wonderful in this, when the sober realities of an *action at law*, which the pursuers' counsel justly say is all we have to deal with, are considered. From the first sentence spoken by Mr. Whigham, to the last words of the Dean of Faculty, what was the point of discussion? Did it not entirely relate to the act of the General Assembly, and the power of the church to make it? And have not your Lordships all so treated the case? And yet, but for the mere statement of the *proceedings* of the presbytery by the *defenders*, we should never have known, *on the record, that such an act existed*, or imagined the idea that the action had any such object. The parties bring a declarator, for the purpose of trying a question as to the validity of a certain act of the church; and in a form of pleading quite *new*, I think, in this court, they leave the whole purpose and object of it to remain a hidden mystery on their own summons and record. They seem to have proceeded on the singular idea, that, unless the presbytery could establish a defence on *the authority of the act* aimed at, their proceedings must fall; not reflecting, that if the presbytery *erred* in what was *clearly their ecclesiastical duty*, it lay

with the party to obtain redress from their ecclesiastical superiors ; and that to resist an action such as this is, they had no occasion to resort to the protection of any act of Assembly, but had only to state that the action as laid was incompetent in any civil court. Neither have they pleaded any thing else, as erroneously supposed. They narrate in the answers to the condescendence the proceedings of the presbytery simply. But their *defence* AGAINST THE SUMMONS is in a few words, that the Court has *no jurisdiction* to try the case *there libelled*.

It is supposed by some of your Lordships, that the *defence* is put on the act of Assembly. With deference, it is *not* so. NO ACT OF ASSEMBLY IS MENTIONED FROM THE BEGINNING TO THE END OF THE DEFENCES. So, we are in the extraordinary predicament, that we are engaged in discussing the legality of an act of Assembly, *the very existence of which is not to be discovered either in the summons or in the defences. Neither is it in the record at all.* For, though in the mere narrative of the proceedings of the presbytery in the answers to the condescendence, we see something of *some act* of the Assembly 1834, and certain regulations in *some act of Assembly anent calls*, the act on which this question is raised, is *not cited and not referred to in any definite form*, and NO PART OF THE DEFENCE IS RESTED UPON IT. *There is NO PLEA IN LAW for EITHER party on the subject.*

It is in this strange way, that the pursuers have got up what they call their argument *in their own declarator*, but which is really a pleading on *an entirely different case*, on which their summons furnishes no means of pronouncing any judgment. Decree in terms of the libel in its declaratory conclusion, would decide *nothing* in regard to *the act of Assembly*. They think, I suppose, that they are to get this by *inference*,—the marvellous idea, of getting, in an *action at law*, what *they do not ask*, and tacitly admit they cannot *competently obtain*.

Nevertheless, upon such a summons and such a record, we are forced into this large discussion on the original constitution of the Church of Scotland, and its whole history since the Reformation—on the powers of legislation vested in the church courts—on all the statutes regarding the law of patronage—and on every thing in the remotest degree connected with any of those wide subjects—all, in order that we, a civil court, may judge, according to the terms of the summons, whether a single presbytery, in a country district, has committed an *error of judgment* in its peculiar and undisputed function of the *admission* of a minister. We learn by mere chance the fact, not naturally calculated to improve such a case on the pursuers' part, that that presbytery acted in obedience to a standing law of the church, to which all the members of it had sworn, as the pursuer had also solemnly engaged, to give all subjection. And on this strange basis we begin the inquiry, held essential to the pursuers' case, which, on

the showing of the action at law and the record under it, has no relation to it at all.

A great deal has been said about the importance of giving obedience to acts of parliament. No one can doubt the truth of such observations, especially when the meaning of the statute is clear; and therefore I think it is our first duty, to enforce the observance of the statute which regulates all our proceedings,—I mean the judicature act, 6 Geo. IV. c. 120, in which I read, in § 10 and 11, that after the record is closed and authenticated, “the record so made up and authenticated shall be held as *foreclosing the parties* from stating *any new averments* in point of *fact*,” and “*The pleas stated on the record*, and authenticated as before directed, shall be held as *the sole grounds of action* or of defence in point of law, and to which the future ARGUMENTS of the parties shall be confined.” How has this statute been observed by the *pursuers* in this case? *The fact*, on which the whole argument of the pursuers proceeds, is not regularly, or in any authentic shape, *in the record at all*. *The plea* which has occupied so many days of the time of the Court, is not even hinted at, *either* in the *summons* or in the *closed record*. The defenders, of course, were obliged to follow the pursuers in the hearing appointed. But now, when the matter is in the hands of the Court, I think it the most extraordinary thing I have met with since the passing of the 6th Geo. IV., that we should be called on to give any judgment on *a case of fact* and *a case of law*, which is not to be found in any definite form in the closed record. I say that the whole proceeding is a direct violation of the statute.

But the matter is even much worse than this; for not only is there no plea founded on the illegality of the act of Assembly, but, as Lord Fullerton has shown, the case is not even laid on the ground of *illegality* in giving effect to the dissent of any *majority* of *any imaginable* class or denomination of the heritors, elders, heads of families, communicants, or the congregation; it is laid on the illegality of the rejection “by *any portion* of the parishioners or hearers.” And, while the summons distinctly places the case on a denial of the necessity of any call whatever, *without even mentioning such a thing*, the pleas in law contain not *one* word to cover such a point. If, therefore, you hold, on the one hand, the moderation of a call to be an established part of the process of induction, which, under the act of Assembly 1782, the express finding of the Assembly 1790 quoted by the Solicitor-General, and the uniform and invariable practice of every presbytery since, it is not possible for the presbytery to dispense with, the summons is nugatory, and no judgment can pass on it. And if, on the other hand, you hold that *no* call at all is necessary, and that this court of purely civil jurisdiction can so find, you must do it *without a summons*, which states either the fact or the conclusion, *and without a record*, in which either

the *fact* is stated in any regular shape, or any plea whatever is taken on it.

But this latitude given to these pursuers, which has not been allowed in any other case known to me, becomes peculiarly inconvenient and most unjust, in the progress of the argument, in which the pursuers insist, not only on what *has been done* in this case, but on what *may be done hereafter*. Have they any right to do so *upon this record*? The general act of the Assembly is one thing; and it is not mentioned in the record of the pursuers in any way. The interim act of *regulations*, which was in force when this case arose, is perfectly distinct from it, and was passed *at a different time*. The first was finally passed into a standing law with concurrence of the presbyteries in 1835; but no final act of regulations has even yet been passed. That is a matter which still rests with the church, the several acts passed by the successive Assemblies being merely *interim* acts of regulation for the guidance of presbyteries. Now, supposing that the defects of the summons and record could so far be got over (which I think impossible), as to allow the pursuers to discuss the legality of the general law, and of *the things done* under it, so far as they *were* done in *this case*, that is the utmost latitude which can legitimately or fairly be given. If they are allowed to speak of the act of regulations, in so far as it *did come into operation* in this case, it is surely going far enough to grant this, where they have made no record at all upon it or beyond it.

The pursuers' counsel went into a great number of hard criticisms on this act of regulations, many of them, in my opinion, very light and trivial, and some of a nature which, I own, I should not have expected; and I must say, that they find many things in them which exist only in the imagination of the pursuers. I have no intention to discuss those criticisms; but as the learned counsel think they have discovered, that the regulation about the *jus devolutum* lies at the root of the whole law, and have insisted on it, as giving a clear competency to their action, in which idea some of your Lordships seem to agree, I think it proper here to say a few words on that point. And

(1.) As the pursuers have made *no record* on the subject of *jus devolutum*, they have no right to make their case in any way rest on it. *It is not mentioned from the beginning to the end of the record, either by the pursuers or by the defenders*. This is a *most important point*. There is no other example of such pleading even in the looseness of old practice. I say that your Lordships have no power to consider it at all. The pursuers have made no case upon it, which can enable the Court to do so. And is it not quite intolerable, and in the face of the whole letter and principle of the judicature act, that the defenders should be called upon to defend themselves against a case not stated in the record, and of which they have

no notice in it—and a case *totally and essentially different* from the only case that is stated in the summons and condescendence? As far as my judgment goes, I cannot consent to allow it.

(2.) Not a syllable concerning the *jus devolutum* occurs in the *minutes of the presbytery*. They have *done nothing in it*; and, therefore, whatever regulation may have existed for the contingent event of that right falling, it is nothing to the pursuers upon this record, since *no act or proceeding* is complained of, having any relation to it.

(3.) At the date of the judgment of the presbytery, the *jus devolutum* *had not fallen*, even assuming the act of Assembly to take effect, and consequently no act *could* be done on it. The proceedings in the Synod and Assembly suspended the time; and the presbytery have not done in this case, what the presbytery in the case of Auchtermuchty did, by proceeding to exercise a *jus devolutum*, while the six months were still current.

(4.) When the *jus devolutum* does *legally* fall, it *belongs to the church-courts to regulate it, and they have always done so*.

(5.) If the presbytery assumes the *jus devolutum*, when the patron thinks it has not fallen, it is admitted that he has a remedy in the civil court to certain effects; and, if he thought it could not legally fall by consequence of the act 1834, he might possibly have tried that, in regard *to the stipend*, when the case occurred, but not till then—not *while the six months* were running, and no *jus devolutum* was claimed. The cases referred to on this subject were all cases, either where the *jus devolutum* was *acted on* within the six months, or where the time was expired, but the patron maintained that the right had not fallen; and were all confined to the stipend.

(6.) The *regulation* makes no change on this, nor attempts it. The *time* is left *to the time limited by law*. It is but a direction *when the jus devolutum shall have fallen*.

(7.) The further regulation is not justly dealt with. It is supposed to have been at the root of the act, as if the object had been to grasp power to the church. Nothing can betray more a morbid jealousy on this subject. It is evidently the very *reverse*. The *regulations* had no existence, (I speak in the presence of some who know the *fact*,) and *had not even been conceived*, till *after* the act was carried and passed. The records of the Assembly shew this—It was *several days after* the general resolution was passed, before *any* regulations could be adjusted, or even proposed; but this had *not been even thought of before*.

(8.) The last clause, as to the act not taking effect in the event of the *jus devolutum* falling, seems to have had two objects, *First*, It appears to have been conceived in *favour* of the *patron* and his *presentee*—to bring about *agreement* between them and the *people*, who would scarcely ever desire the right of appointment to fall to the presbytery. *Secondly*, That, when it did fall in the

hands of the presbytery, there should be a sure way of ending the process by the church courts. And, whatever hard reasonings, from unjust jealousy, may be applied to this by the pursuers, I cannot but think it quite reasonable. The settlement *jure devoluto* is peculiar: *When it falls*, the matter becomes ecclesiastical: The PATRON HAS NOTHING TO DO WITH IT, nor has any presentee who has been legally rejected. *No time is limited* for the presbytery to present: When the time for *patrons* was limited, that was put as the *final remedy*. Properly it is, that the presbytery finding a church vacant *plant a minister themselves*. It is presumed they will *consult the people*. If they don't get the *consent of the people*, the remedy lies with the Superior Courts. The *fundamental law of non-intrusion is not violated*—only the *special rule or instruction* is superseded in that particular case.

But if a right to present *jure devoluto* be assumed, when it has not fallen, it is plainly matter of civil right. The words may be criticised, but the substance is clear.

(9.) The act of regulations in 1834 is not passed into a standing law yet: Several presbyteries object to that very article, especially *those most adverse to patronage*: It may be altered yet. Whether it is or not, it is *nothing to the pursuers, if the law itself is valid*; for nothing has been done on it here; and besides, if the *jus devolutum* has fallen, the *mode of exercise is extraneous*.

(10.) In this the *root* of the whole matter, *not one case of jus devolutum has occurred in nearly four years*. But I must again repeat, with all possible deference, that, in my opinion, there cannot be anything clearer, either in *law*, in *form*, or in *substantial justice*, than that there is no case here having any relation to the *jus devolutum*.

There is another question behind, in regard to the jurisdiction of the court to try such a question, of vast and serious importance. I mean the question which was first spoken to by Lord Fullerton, Whether, if all the difficulties of the summons and record were laid aside, there is any competency in the attempt to make this court *review* the proceedings of the ecclesiastical courts, on the particular points which are here brought under our notice. I should proceed at once to the consideration of that question, and of the cases relied on as proving the jurisdiction, if it were not that the very peculiar nature of the pleas which the pursuers have maintained, concerning the constitution of the Church of Scotland, renders it impossible for me to bring out fully the views which I entertain of that question of jurisdiction, until I have first endeavoured to form some correct estimate of the extent and qualities of the ecclesiastical jurisdiction with which we have to deal.

Saving, then, my opinion as to the entire incompetency of the de-

mand of the pursuers in argument, that we should form any judgment on the validity of the act of 1834, as the proceeding of the lawfully constituted authority in matters ecclesiastical; I proceed to enter on that question. I deny, with all deference, that it is competent for this court to consider the constitutional correctness or incorrectness of that law; and have very particularly to remark, that when we do consider it, we are not dealing merely with the act of a Court of Judicatory *however high*, but with the act of a *Legislative Assembly*, ratified by the whole church. This is what renders it necessary for me to consider very particularly the attempt made, to limit, or do away, all the important powers of legislation which, I think, do belong to the church courts.

The question concerning the power of the church to pass the act 1834 seems to turn on three points, in the view of the pursuers.

- (1.) Is the statement of the fundamental law *true*?
- (2.) Is a *call, concurrence, or consent*, of the people, an essential part of the constitution of the church in the admission of ministers?

- (3.) Is the provision made in the act of Assembly 1834 a *legal* mode of regulating what shall be deemed *sufficient consent*.

But, in my view, there is always a fourth point.

- (4.) Whether it is not the exclusive province of the church, to declare *what* is the law of the church, and to regulate *what otherwise is within their proper province*.

The two first points necessarily run into one another. For the existence of the *general principle* will explain the purpose of the *CALL*, and the *existence* of the *call* proves the *principle*.

I proceed, then, to consider the grounds, on which the declaration in the first part of the act of Assembly 1834 is rested. I can make no pretensions to antiquarian knowledge, and will not venture into a field, which my learned brethren may tread with safety, but in which I should soon find myself bewildered. I must confine myself to what is plainly laid open to me, in the acts and proceedings of the church and of the state, so far as they are within my reach.

The Reformation began in Scotland in 1560. I deny Mr. Whigham's doctrine that, by the statute of that year, the reformed church took nothing from the ancient church. The statutes prove the reverse. I need go no farther than the act 1690, c. 5. which gives us the *fact* in the clearest terms: For it bears, that the king and queen conceiving it their duty, "after the great deliverance that "God hath lately wrought for *this church* and kingdom, in the "first place, to settle and secure therein the true Protestant religion, according to the truth of God's word, as it hath been a long "time professed in this realm; as also the government of Christ's "church within this nation, &c." "And that by an article of the

“claim of right, it is declared, that prelacy and the superiority of any office in the church above presbyteries, is, and hath been a great and insupportable grievance and trouble to this nation, and contrary to the inclinations of the generality of the people, ever since the Reformation, *they having reformed from popery by PRESBYTERS, &c.*” The same in substance is in the earlier statutes, in 1567, “as in the *reformed kirkes* of this realm, &c.” And in 1592, “the true and halie kirk as *presently* established in this realm, &c.”

This, however, is a point, perhaps, of little consequence. And yet it does deserve notice, that so exceedingly anxious are the pursuers to lower and depreciate the strength of the church establishment of Scotland, as feeling this to be essential to their case, that they begin the inquiry into her history, by this extraordinary assumption. That it is contrary to the real state of the case, I have the authority of the statutes for asserting.

As soon as the popedom was thrown off, Knox and those who acted with him set themselves to arrange a system of church government. The First Book of Discipline was composed chiefly by him, soon after the passing of the act 1560. Dr. M'Crie tells us, that it was very hastily composed; and we know that it never did become of authority, either in the church or in the state. It is not a little singular to me, that the pursuers and some of your Lordships should attach so much importance to it, and endeavour to set it up as of higher authority than the Second Book of Discipline. I have always rejected it in the question of patronage, because I know that it never was regularly acknowledged in the church, and because it is in my humble conception, the single ground of authority for any right of *election by the people*. But, strange to say, it is now the authority of the pursuers, against the very different position, of a right of *selection* and *appointment by others*, and the *consent* of the people. How it can aid them in that, I know not, except in the way lately suggested, of comparing the case of an appointment by the *church authorities* on a *failure to elect*, when the power is given to the *people*, with a direct *intrusion against their will*, where *no such opportunity is given* at all. The statement, however, is so much pressed, that it deserves attention; and I have considered it. It seems to me, that the whole passage, though bearing evident marks of haste, is well worthy of attention. First of all, it gives the *election* absolutely to the *people*. I suppose the illustrations from the fifth century, and the foreign churches, as I understand them, will give no aid to the argument as to this first foundation of the Church of Scotland. So far, therefore, the illustrious Knox, in his first design of the church, is perfectly clear of the influence of those authorities, though I doubt not he may have had others to guide him which I cannot pretend

to trace. Then he tells us, that, if the people be found negligent in appointing a minister for forty days, the best reformed church (that is, the superintendents) may present one whom they have examined. After this, no doubt, it is said, that if they refuse the person so appointed, they may be compelled by censure to admit him. The very stating of this shews that *consent* was NECESSARY. I am not able to admit the inflamed statement of the effect of it; I doubt whether it does justice to the character of Knox, as recently brought to light. But, however that may be, the article itself shews that there was no sternness in it; for it tells, that if, after all, the people shall appoint, though after another had been *presented*, *the people's presentee shall be preferred*. What do you say to this *veto*? It is ten times stronger than any other. The patrons are allowed to present, because they are the *people*, after the *jus devolutum* has fallen. Does the passage prove, then, that, whenever the appointment landed in a third party, the voice of the people went for nothing? It proves, with all submission, the reverse. But this was the case of the necessity of the appointment falling into the *church itself*, by the failure of the people to exercise the right of election once given to them. It is, in my opinion, quite foreign to the point, and rather goes to illustrate the principle of the regulation so unjustly criticised in this case, that, when the matter is allowed by the parties having the relative rights to fall into the hands of the church, there ought to be an end of it.

But, if the case were plainly stated, that the *law* of the church was, that, without any right of election, no man *should be intruded against the will of the people*, and that their *consent* must be obtained, I suppose, that whatever subtilties might be found in the canon law, if the appointment were in a *third party foreign to the church*, the idea of *compelling the consent* would rather be too strong for the sober understandings of Scotchmen, however it might possibly suit the notions of the fifth century. Knox had too much sagacity to entertain such an idea.

But I regret to be obliged to treat of the First Book of Discipline in this manner. Though hasty, it had great merit. But, in this point of the power of *election* given to the people, I do not acknowledge it as of any authority. And I beg leave here to express my satisfaction, that, though I pretend to no antiquarian knowledge, the researches of my more learned brethren have so powerfully confirmed all my views as to the general prevalence of the right of patronage in the Christian church, and its full recognition in the laws of this country. Though perhaps I do not get credit for it, as it seems the act of Assembly which I think right, and calculated for the *protection* of patronage, is thought equivalent to its abolition, I agree with all your Lordships on the point, that the law of patronage was at all times the law of this land, and that

it never was the law either of the church or of the state, that the people should have any right of election of their ministers, except only in the *First Book of Discipline*: Yet that is now made the great authority against the doctrine of non-intrusion, although the principle is thus expressly declared in that work,—“For altogether this “is to be avoided, *that any man is to be intruded or thrust in upon “any congregation.*” This is the corollary drawn from the immediately preceding sentence, bearing that though the forty days had elapsed, and *another man had been presented* by the council of the church, *the man appointed by the people* should still be preferred.

But it is also very satisfactory to me to learn, that, in all the foreign churches, and especially the Protestant, there is a uniform system, which requires, that before induction or ordination, the proposed minister must be presented to the congregation or the people, for their *consent* or *disapprobation*. The question how that is to be regulated, and at what particular time the consent is to be asked, appears to me to be of small moment indeed. The broad fact established, if the statements be correct, which I have no doubt they are, is, that in all Christendom *the consent of the people must be asked*, before the presentee of any patron, *even the church itself*, can be admitted or ordained to the pastoral duty. The question, What shall be the effect of positive dissents? is quite a different matter. In my humble judgment, the demand, in point of principle, *of positive consents*, which it seems is according to the laws of all the churches, is a far stronger rule. I have doubts of the correctness of the opinion attributed to Calvin, because, though I believe he was not opposed to patronage, and have read with great pleasure the letter referred to by Lord Medwyn, I have also seen passages in other parts of his works, which import, that it can only be recognised with the *consent* of the *people*. I shall only quote the following short passage:—“*Sic “igitur fert vera ratio, et Dei mandatum, ut nemo se temere in- “gerat, nec privatus quisque pastoris munus usurpet. Sed ut pas- “torum judicio electus, et gregi oblatus ipso consentiente appro- “betur. Huc accedat solennis manuum impositio, quam ordina- “tionem vocant.*”—Calv. Epist. Regi Poloniæ, fol. p. 87.

I infer, therefore, that the first Book of Discipline, so far as material, decidedly proves the fundamental law or principle laid down in the act of Assembly 1834.

I come now to the Second Book of Discipline. It is said, that it was Andrew Melville coming from Geneva, who introduced extravagant notions, and that he was the author of this Book of Discipline. I believe this is a mistake, which has been corrected by Dr. M'Crie in his work, (v. i. pp. 172, 173,) who tells us, and shews by reference to authentic documents, that the extravagant preten-

sions referred to had been strongly maintained by others before Melville came to Scotland, and that he was not the sole author of the Second Book of Discipline, though he had a considerable share in the composition of it. Though there are some extravagant views in it which were not adopted, it was composed with great care, and it did become the law of the church generally. It was adopted by the General Assembly in 1578, and King James is said to have given his consent to it in 1581, though reluctantly and disingenuously. The things he mainly wanted were prelacy and the king's supremacy. This Book of Discipline was made the subject of a conference between a committee of the ministers, and the king's commissioners, in 1578, of which I shall speak presently.

The acts 1567, c. 6 and 7, had in the meantime been passed. The first of them established the Presbyterian Church, though the local courts were not then arranged, and the superintendents held the place which was afterwards given to the presbytery. So it is held by all authorities. Hence the conferences which succeeded. The General Assembly had then the same general character, which it afterwards held under all the statutes; and it is most particularly deserving of notice, *that no civil statute ever defined the constitution of that body*, or laid down any specific rules regarding it. These always rested on the laws and ordinances of the church itself, recognised even in the act 1567, c. 6. as already formed and subsisting. For, attend to what that act does. It "declares the ministers of the blessed evangel of Jesus Christ whom God in his mercy has *now raised up among us*, or hereafter shall raise, agreeing with them that now lives in doctrine and administration of the sacraments, *and the people of the realm that professes Christ as he is now offered* in his evangel, and does communicate with the *halie sacrament, (as in the REFORMED kirkes of this realm are publicly administrate)*, according to the Confession of Faith, *to be the trew and halie kirk of Jesus Christ within this realm;*" and it decerns and declares all who either gainsay the word of evangel, received and approved, as the heads of "the Confession of Faith professed in Parliament in 1560," and specified and registrat in the acts of Parliament in the first year of the king's reign, and ratified in this present Parliament, or that refuse the administration of the sacraments as they are now ministrat, "to be *na members of the said kirk within this realm, and trew religion now presently professed.*" This is a full recognition of the church *reformed by presbyters* as the established church of the realm; and it will be observed, that the Confession of Faith 1560, which is here ratified, bears in ch. 17, that the Lord Jesus Christ "is the only Head of the same kirk, &c."

The Presbyterian Church being thus established, the act 1567, c. 7, regulates the matter of the *admission of ministers*. It bears expressly, "that the *examination and admission* of ministers be

“*only in the power of the kirk*, now openly and publicly profess-
 “ed.” It is very manifest to me, that this broad provision placed the whole matter of admission in the exclusive power of the church courts, and paramountly of the General Assembly, which is expressly recognised as the supreme court in the later part of the statute ; and I have no idea, that the power of review by that Assembly, in the case of the superintendent *admitting* or resolving to admit a man thought to be incompetent, was not as necessarily implied in the whole scope of the act, as their power of review in the event of his refusing to receive and admit a person duly presented by a lawful patron. I think it altogether impossible, on any sound principle of construction, to arrive at such a conclusion. If the exclusive power in the admission of ministers was vested in the kirk by the act, it cannot be otherwise than that the supreme court of the kirk had full superintendence and jurisdiction in that matter. The act saves the rights of laick patrons ; no doubt of it. But then it is most explicit in these points : 1. That it supposes that the patron *may* present a person whom the kirk *may lawfully* reject. 2. That if he presents a person qualified *to his understanding*, and the superintendent notwithstanding *refuses to receive and admit* him, his appeal is not to any civil court, but solely to the provincial Assembly or synod, and the General Assembly. And, 3. That by the General Assembly, “the cause being decided, *shall take end, as they decern and declare.*” It is final and conclusive judgment ; and it is evident, that this provision necessarily implies, that *the General Assembly already had a constitution settled.*

As it is quite clear, that this statute stands fully ratified in all its points, I apprehend, that it is impossible to strike this last clause out of it on any ground whatever. It can make no difference on the subsisting efficacy of it, that by the act 1592, c. 116, the court of the presbytery was substituted for the superintendent in the special matter of presentations to be directed to them, and in the duty of receiving and admitting ministers so presented. For that act, as will be immediately seen, ratified in the fullest manner the jurisdiction of the General Assembly, and established the subordination of the inferior judicatories ; and it at the same time distinctly ratified (through another act 1581,) the act 1567, c. 7, without the slightest qualification. I therefore think it the clearest thing in the world, that the part of the act relative to the appeal to the synod and Assembly, and the *finality* of the *judgment of the latter*, was made to apply as much to the case of the refusal of a *presbytery* to receive a presentee, as it had before applied to the refusal of the superintendent. It was but a change in the form of the inferior jurisdictions of the church, both being at the different times but parts of the Presbyterian kirk itself, to which the exclusive province of the examination and admission of ministers

was beyond doubt committed. But, indeed, if the simple case be taken, that the presbytery reject a man, upon trial, in respect of defect of any thing which may be admitted to be strictly matter of *qualification*, I imagine, that it will appear to be indisputable, even now, that the only appeal must be to the synod and Assembly, and that the judgment of the Assembly must be conclusive.

The LORD PRESIDENT.—We are all agreed in that.

LORD MONCREIFF. I am not sure whether we are agreed or no. I think I heard it stated, notwithstanding the admission as to the right of the church courts to refuse a presentee whom they found to be unqualified, that, if the effect of the judgment be such as to affect civil rights, it is competent to bring even that case into this Court. So far as I can understand the views that have been stated, they appeared to me to go thus far; and I put a case under the act 1567, or under the law as I think it is admitted to stand, with regard to qualification, in order to test the soundness of the principle so assumed. Bearing in mind, that the church courts have thereby an absolute and uncontrolled power of deciding in the qualifications of a presentee,—bearing in mind, too, that the rejection of the presentee, on the ground of non-qualification, must in *every* case *necessarily* affect the civil rights of the party, what course may the patron take? According to the view suggested, as I understand it, he may come to this Court, and say, “You hold that you have jurisdiction to set aside such decisions of the church courts as interfere with the civil rights of the parties; my presentee has been rejected on the ground of non-qualification, whereby he loses the benefice; but I maintain that he is a perfectly qualified person, and I call upon you to redress the civil wrong which has been done.” If we are forced into such a question, it is a necessary consequence of the view I am speaking of; and I allude to it now, because it may be taken appropriately in connection with the act 1567, which I think can be demonstrated to be in full and effectual force; and because, in the enactment of that statute, I see the clear ground on which the church stands, with regard to all matters that relate to the admission, induction, and ordination of ministers.

But now, leaving that statute, I come to the conference to which I have already alluded, which was held with the Commissioners of the King, on the subject of the Second Book of Discipline; and I look upon this as so exceedingly important, in my view of what followed, that I can by no means think that it can be thrown aside in the way the pursuers did, but, on the contrary, consider to be well worthy of the most serious attention.

The Book of Discipline, after having been approved of by the Assembly 1778, was presented to the King, who appointed Commissioners to confer with the clergy on the work. The whole result

of the conference which was held, is recorded by Archbishop Spottiswood, (Hist. p. 289, &c.) who states expressly that he had the original minutes of it before him; for, he says, "Wherefore I thought meet to set down the form of policy, as it was presented, with the notes of *their agreement or disagreement, AS THEY STAND IN THE ORIGINAL, WHICH I HAVE BY ME.*" What he sets down, therefore, is upon no doubtful authority; he copies from the original record of the conference lying before him; and such a document recorded by him is certainly not of the less authority in the material points, that he was no friend to the Presbyterian Church. There is nothing to contradict it; and it must therefore be taken, as unquestionably exhibiting a true account of what took place in that important conference.

Now see how very pointed it is. He goes through the whole articles, and marks opposite to every one of them, whether it was *agreed to, rejected, or referred* for further consideration. When he comes to the 3d chapter, of which the subject is, "How persons ecclesiastical are admitted,"* he goes over the 1st, 2d, 3d, and 4th articles, which are all marked "*agreed*;" so is the 5th, which is, "That none ought to presume to enter into any office ecclesiastical, unless he have a good testimony in his conscience before God," &c. Then comes the touching point of the election and ordination, the 6th article, bearing, "That this ordinary and outward calling hath two parts, election and ordination." The 7th is, that the election should be "*by the judgment of the eldership and consent of the congregation.*" This is the claim of the *right of appointment to the presbytery*, by implication *excluding patronage*.

What do the Commissioners say to these? Not "*agreed*," but "*referred*." That is to say, the claim was not granted, but *reserved for consideration* by the King or Parliament, being contrary to the act 1567. The 8th article relates only to the general qualities of those who should have charge in the church, and is marked "*agreed with the generality thereof.*"

Then come the material articles 9 and 10. The 9th, especially, is the important one, in these words:—"In this ordinary election it is to be eschewed, *that no person be intruded in any of the offices of the Church, contrary to the will of the congregation to whom they are appointed*, or without the voice of the eldership."

Now, opposite to this 9th article the Archbishop marks the resolution of the Commissioners, "*Agreed.*" It thus appears from the *original minutes* of the conference, copied into his work by a person who was noway friendly to the Presbyterian Church, that in that solemn meeting, the leading men of the clergy, and the *Commissioners who appeared on behalf of the King*, were alike AGREED on the great principle, that in this ordinary election, "it is

* See, for the words of the Articles, the Dean of Faculty's speech, p. 208.

to be eschewit that *no man be intruded into any office of the Church contrary to the will of the congregation.*"

The article referred to by one of your Lordships is in a different part of the book. It truly serves to show, that nothing in regard to the articles 7th and 9th of chapter 3, had either passed *per incuriam* by the Commissioners, or been set down by any mistake. That is in chapter 12, articles 9 and 10. The 9th is, that "*none be intruded on the congregation, either by the prince, or by any other superior person, without lawful election, and the assent of the people,*" &c. The Commissioners seem to have put their own interpretation on the words, "lawful election," as not excluding patronage, and to have considered the substance of the article as consisting in the "*assent of the people*" required, and the principle against intrusion without it; and, taking it in this view, it is very remarkable, that their resolution on it was, "*Agreed to the general,*" thus again granting the *general principle* against intrusion without the assent of the people, yet saving themselves against any construction of the article which might import a denial of the *rights of patronage*, as spoken of in the next article. That 10th article runs thus:—"And because this order cannot stand with patronage and presentation of benefices used in the Pope's church, we desire all those that truly fear God, to consider that patronage and benefices have no ground in the word of God, but is contrary to the same, and to the liberty of election of pastors, and ought not now to have place in the light of reformation," &c. On this it is to be observed, (1.) That the framers of the book, when *they* spoke of lawful election in the 9th article, must have meant election by the judgment of the eldership, as in the 7th of chapter 3. Consequently, (2.) When they said that the rule in that article 9 could not stand with patronage used as in the Pope's Kirk, it is plain, that they had reference chiefly to *that right of appointment* claimed for the *presbytery*. But, (3.) The patronage spoken of, is patronage as used in the Pope's Kirk, that is, uncontrolled patronage, without the consent of the people being required. Now, the Commissioners, after having expressly agreed to the general principle of the 9th article against intrusion without the consent of the people, as they had before done, under the 3d chapter, now refuse to assent to the proposition which went to the abolition of the rights of patronage; and it is accordingly marked, "Referred," in the same manner as the previous article to the same effect had been. Thus we have a *second time* the result of the conference distinctly brought out in both points; *first*, refusing to give up the rights of patronage, or to grant the claims for election by the presbytery; and, *second*, the general principle against intrusion, contrary to the will of the people, again specially conceded. I apprehend that it is impossible

to estimate too highly the importance of these passages of the conference; for they show, that the principle of non-intrusion was so deeply rooted in the church, that the Commissioners of the King, when canvassing everything doubtful—everything that could be objected to—were so clear on this point, that it is marked in both parts of the Book of Discipline where it is mentioned, as *agreed to*. Neither do I think, that there is any weight in the observation, that because it was here said that the rule laid down in the 9th article of chapter 12, could not stand with patronage as used in the Pope's Kirk, it must be inferred, that as the rights of patronage were not given up, but established by the subsequent statute, the principle of the necessity of the consent of the people must fall also. This I think a complete misapprehension. The right of *election* claimed by the *presbytery* evidently could not stand with the rights of patronage in any sense. But it does not at all follow, that the principle twice set forth, and twice agreed to, that no man should be intruded without the consent of the people, was therefore of no effect if the election were not given to the presbytery. It was only the more important and the more necessary.

There is another article of considerable importance in this question. I refer to article 11 of chapter 7: It relates to the powers of General Assemblies, and bears, "They have power also to abrogate all statutes and ordinances concerning ecclesiastical matters that are found noisome and unprofitable, and agree not with the time, or are abused by the people." This article is marked on the margin, "*Agreed; that as they make acts in spiritual things, so they may alter the same as the necessity of the time requires.*" So that their authority to make laws is acknowledged, and the legislative power of the Assembly is conceded, in terms even more ample and explicit than those of the article itself.

But perhaps the most remarkable thing of all, in reference to the act 1592, is to be found in the articles which relate to the arrangement of the inferior judicatories. All the articles, with regard to these inferior ecclesiastical courts, are "*Referred*" for consideration. The Commissioners apparently had not made up their minds to grant all the things stated; but yet I think it must appear, that a great many points had been agreed on afterwards, though it was not thought necessary to mention them all in the act of parliament which followed.

And now let me ask, is it then a pretence to say, that the law or principle against intrusion is an original law of the Church? We have found it in the First Book of Discipline. Here we find it in the Second Book of Discipline, *as agreed to* by the learned Commissioners acting for the king. The claim as to the election and appointment of ministers, on the other hand, is not agreed to. It is substantially rejected. The act 1567 again admits the principle, that

the church shall have the sole power of admitting ministers, and that the judgment of the General Assembly shall be final in that matter. I apprehend that this put into the hands of the church the right of judging, not merely of the moral and literary qualifications of the individual, but in general of his fitness for a particular charge, as well as all other circumstances that might be brought before them. I think it impossible to doubt, that this is the true meaning of it. An attempt has been made to say, that this part of the act is obsolete. I cannot agree in any such view. In no case, except on questions of disputed presentations in one form or another, has the point ever been attempted to be raised in this court. It has never been held by the court, that they could interfere in any other case than one involving civil rights, and to civil effects only; and, most particularly, there is no example of its interference in any case of rejection on *the defects of the call*: Such cases have always been judged of finally by the General Assembly, as was fully shown by Lord Fullerton.

King James, though he had given his consent to the Second Book of Discipline in 1581, if we may trust the historian,* was certainly temporizing; for we find, that in 1584 presbytery was overthrown. It could not have been overthrown, had it not previously been settled. Then came the three acts of parliament, 1584, c. 129—1584, c. 131—1584, c. 132. I am surprised that these acts are at all quoted, or that the pursuers thought it worth while to put them among the statutes on which they founded. Dr. M'Crie says, they were called "*the Black Acts*" of a servile parliament; and describes them as "eversive of all liberty, natural and civil, as well as ecclesiastical." As to the act 1584, c. 129, it is declared by 1592, c. 116, that "it shall not derogate any thing from the privilege that God has given to the spiritual office-bearers in the kirk, concerning heads of religion, &c." "*Collation*" and deprivation of Ministers, &c."

The act 1584, c. 132, was totally repealed by 1592; and chapter 131 only related to civil and criminal jurisdiction, with reference to the Raid of Ruthven, and was passed to meet some unwarrantable pretensions of exemption which were set up by churchmen; and it was not thought necessary to repeal it in 1592.

It was maintained in the argument of counsel, that this part of the act 1592 gave the office-bearers no other powers than what are there expressly signified. It seems to me to be quite clear, from the tenor of the whole passage, that they were meant to judge of many other things which are not specified. "Heads of Religion, Collation," &c., are terms which comprehend all that is necessary for this question. There are many things not mentioned, such as

* Cook, i. 382, &c. M'Crie's Life of Melville, i. 310.

marriage, and many others, which undoubtedly do belong to the church.

But I have now to consider particularly that important statute 1592.

Tuesday March 6.

LORD MONCREIFF.—My Lord President, in resuming the statements in which I was engaged when the Court adjourned on Saturday, I shall recapitulate nothing, except to remind your Lordships, 1. That the Second Book of Discipline, after having been approved of by the General Assembly as then fully recognised, had been presented to the king; 2. That in the conference which followed, all the material points, viz. the principle of *non-intrusion*, and the legislative powers of the Assembly, had been fully agreed to and conceded, while the article of election was referred, and those regarding the courts were also referred for consideration; 3. That the Reformed Presbyterian Church had been distinctly ratified as previously existing, as being the true Church of this realm, by the act 1567. c. 6, though the Court of the Presbytery had not been settled, and the superintendents held the place which was afterwards given to it; 4. That by the act 1567, c. 7. the exclusive power of the examination and admission of ministers was vested in the Kirk so established, and it was provided that, if the superintendents should refuse to receive and admit a person who was qualified to the patron's understanding, the appeal should be to the synod and General Assembly, by whose judgment the matter should take end; and I hope I shewed satisfactorily, that, if that act is itself in force, it must be in force in all its parts, notwithstanding that the superintendents gave place to the presbytery under the act 1592.

Now, observe, that an act not among those printed in this cause 1581, c. 1. (or 99, as in the small edition) expressly ratifies all acts and statutes “for maintaining *the true Kirk* of God and religion, *now presently professed within the realm*, and purity thereof;” and among other acts enumerated is the act 1567, c. 7, “anent the admission of them that shall be presented to benefices,” &c.

Keeping these things in view, let us pass to the act 1592, c. 116, which *restored* the Presbyterian Church, after it had been for a time overthrown by the acts of 1584.

This act begins with ratifying all the “liberties, privileges, immunities, and freedoms of the true and halie Kirk PRESENTLY

“ESTABLISHED *within this realm*,” as declared in act 1579, c. 1, which ratifies all acts for the maintenance of the true Kirk as “*now presently professed within this realm*.”

Then the act specially ratifies 1581, c. 1, (or 99.) That act is chiefly important in the point already mentioned, that, while it ratifies all prior acts in favour of the Kirk as presently professed, it ratifies specially “Act anent the admission of them that sall be presented to benefices having cure of ministry,” which is 1567, c. 7. Beyond all doubt, that act 1567 is thus confirmed by 1592; and I apprehend, that this cannot be mistaken or rendered in the least doubtful.

Then it ratifies all *other acts* in favour of the *True Kirk*; and next comes the clause in these words: “*Ratifies and approves the General Assemblies appointed by the said Kirk*, and declares “that it shall be lawful to the Kirk and ministers, every year at the least, and oftener *pro re nata*, as occasion and necessity will require, to hold and keep General Assemblies; providing that the king’s majesty, or his commissioners with them to be appointed by his highness, be present at ilk General Assembly, before the dissolving thereof, nominate and appoint time and place, when and where the next General Assembly will be holden; and in case neither his majesty nor his saids commissioners be present, for the time, in that town where the said General Assembly was holden, *then and in that case, it shall be lesum to the said General Assembly, BY THEMSELVES, to nominate and appoint time and place where the next General Assembly of the Kirk shall be kept and holden, AS THEY HAVE BEEN IN USE TO DO THEIR TIMES BY PAST.*”

Thus the power to hold Assemblies is clear: The act requires, that the king or his commissioner, if in the town, be present before the end of the Assembly, that he may have some voice in the appointment of time of the next meeting; but it says expressly, that, if neither the sovereign nor his representative be in the town, the General Assembly has full power to hold meetings, and to appoint another time for meeting, *as they had been in use to do in times by past*. Then the act goes on to approve of the proposed Synodical or Provincial Assemblies, Presbyteries, and Sessions, (in fact according to the Book of Discipline) with the hail jurisdictions, &c. agreed upon in conference, of which the tenor follows, &c. My belief is, that there had been a further conference after that recorded by Spottiswood, in regard to the particular point of the establishment of the jurisdiction of the presbyteries as in place of the superintendents, and the definition of the exact position of the synods and kirk sessions; because, in the general conference on the Book of Discipline, it is clear that *these* matters were not agreed on, but *referred* for consideration. But now they had been settled; and it is most apparent

to me, that what follows, in this part of the statute, has relation only to this arrangement of the inferior courts, and that the powers of the General Assembly and of the Church generally were assumed to rest on broader grounds already settled. The act goes on to approve of the Synodical Assemblies, to be held twice in the year, *as they have been, and are in use to do*, within every province in this realm,—a broad enough clause to cover every thing, though many particulars are omitted. It then ratifies presbyteries and kirk sessions, with the hail jurisdiction and discipline agreed upon in conference, of which articles the tenor is said to follow. The act treats of each of these Assemblies. It says, that the synods are to treat of *weighty* matters, &c. and have *power* to do certain things; but not that these are all the things they can do. It declares the powers of the presbyteries (newly instituted) but with this remarkable clause: “Providing that they alter *no rules made* by the provincial or *General Assemblies.*” Where is the power laid down in the statute for the General Assembly to make rules? Quite certainly, that is left to depend on the laws of the Church itself, under which, as sanctioned in the conference, they had clear power to make laws in all ecclesiastical affairs. Then, after stating the position of the *kirk sessions* as the lowest court, the act goes on thus: “And declares and declares the saids Assemblies, and presbyteries, and sessions, *jurisdiction and discipline thereof* foresaid, to be in all time coming maist just, gude, and godly in theselle, notwithstanding of whatsoever statutes, acts, canone, civil, or municipal lawes made in the contrair.” Then it abrogates all acts prejudicial to the true Kirk, “*presently professed* within this realm, *jurisdiction and discipline thereof*,” and against “*the liberty of the true Kirk, jurisdiction, and discipline thereof*, AS THE SAMEN IS USED AND EXERCISED WITHIN THIS REALM.” In the last part of the act, it plainly puts the whole powers of *collation* and *admission* in the Church courts, as it was by 1567 ratified by this act, and with this broad clause, “TO PUT ORDER TO ALL MATTERS AND CAUSES ECCLESIASTICAL within their bounds, according to the discipline of the Kirk.” There never was or could be a doubt, that this vested the power in the Church courts in their order, though formally given to the presbytery in this new arrangement of their institution.

The Book of Discipline having received the sanction of the Assembly 1678, and being the rule laid down for the guidance of the Church, I apprehend that the pursuers must be in great difficulty, and their case must be of a very unmanageable nature, when it compels them to plead, that there was no presbyterian church till this act was passed—an act which contained only these few particulars as to the inferior judicatures, but which manifestly and expressly proceeded on the very fact thus denied, the prior existence and constitution of the

Church. That act recognised the true Church presently established : It ratified previous acts which said the same thing ; and it says nothing of the jurisdiction and powers of the General Assembly, except in the broad terms, “ as the same were *used in times by past.*” It is a most alarming notion for the Church of Scotland, that an attempt should be made to limit the powers of the General Assembly and the ecclesiastical courts, in the manner which the pursuers have attempted. Is this the only statute which may not be explained by two centuries and a-half of practice ? My Lord, we are here far on in the nineteenth century, and ever since the date of that statute, acts and laws have been constantly passed by the General Assemblies of the Church, proceeding on no more precise authority than that act, in its broad ratification of the government and discipline of the church as before constituted. The laws so enacted have been directed to the regulation of every thing within the jurisdiction of the Assembly and the inferior courts, and have been gradually accumulated in their voluminous records. Have we not innumerable instances of laws of the very same description as those which are now said to be contrary to their powers ? I am not aware, that any such idea as that here maintained was ever suggested in any court, civil or ecclesiastical, till the necessities of the present case drove the pursuers to this course. I deny that the act 1592 was either a *compact* or an *institution*. It was an authoritative recognition of the existing *Presbyterian Reformed Church* as having existed at least previous to the year 1567, and a confirmation of the Second Book of Discipline, in plain words, as to the order of the Assemblies, viz. kirk-sessions, presbyteries, synods, and General Assemblies, as they have been since still further ratified and secured by the act of 1690, and the Act of Union of the kingdoms. But the powers of legislation and of judicial trial vested in the Assembly, and many other things belonging to the clergy and the Church courts generally, amongst which may be mentioned the celebration of marriage and other similar functions, are not laid down specifically in any act of Parliament, but rest on the Second Book of Discipline and the general laws of the Church, as recognised by the previous statutes.

But at last we come to this broad clause, introduced with a special relation to the power of the presbytery to give collation. “ And “ to *put order to all matters and causes ecclesiastical within their bounds, ACCORDING TO THE DISCIPLINE OF THE KIRK.*” This important provision seems to have been too much left out of view in the discussions on this act 1592. I think it nothing less than a direct committal of all ecclesiastical affairs, and among them every thing connected with the admission and collation of ministers, into the exclusive jurisdiction of the church courts, and at the same time a distinct recognition of the Book of Discipline as their guide in all such matters ; for there can be no doubt, in my conception, that the clause, in conformity to the whole scope of the act, gives the

most ample powers of review to the General Assembly, in all matters competent to the presbytery. But I apprehend, besides, and should think it too clear for argument, that throughout the act, it always supposes many powers, and many principles, to exist in the constitution of the church, which are not embodied in any civil statute ; and among these I hold to be, the fundamental principle against the intrusion of ministers contrary to the will of the people, as laid down in the Second Book of Discipline, and implied in the *exclusive* powers of admission, and the *finality* of the judgment of the Assembly in every such matter, conferred and declared by the act 1567.

This statute 1592 has been called the charter of the Church of Scotland. It is so, in combination with the claim of right and the conditions on which the crown of Scotland was tendered to king William III., the acts of 1690, the act of the treaty of Union, the act of security, and the oath of all the monarchs of the united kingdom. But what kind of a charter is it ? Is it a charter which carries nothing but the few particulars which are specially expressed in it ? I have a very different idea of it. The character which the pursuers would put on it is, that they would make the King and the Parliament say to the Church, 'There is your charter.' But you must take it by its strictest letter. We give you the dead inert matter of a church establishment, but not one drop of the life's blood of a free and active constitution. If you pass but an hairbreadth or a scruple's weight beyond what is written in the very letter, you violate the compact, says Mr. Whigham, you transgress the institution, says the Dean of Faculty. You may take your *General Assemblies* ; but mark well, we give you no *powers* to those Assemblies—for none are written in the charter ; we give no constitution for forming them, no jurisdiction to make them efficient, no power to make laws for the church at large—for no such things are to be found in the letter of the charter. And as to your provincial synods, presbyteries, and kirk-sessions, we institute them, with a few particular powers and capacities agreed upon in conference—but beyond these they can exercise no power whatever. Would king James and his Parliament have dared to make such a proposal to such a nation as the people of Scotland, or to the intrepid spirits who then guided them in their spiritual and ecclesiastical interests ? I think it a moral impossibility ; and, however disingenuous James might be, there is no trace of such a thing either in the act itself, or in the history connected with it. It is, with the utmost submission, a very surprising thing to me, that this statute, with such broad words of jurisdiction, clearly referring to the Presbyterian Church as *already existing and recognised* and established by many statutes of the realm, should for a moment be so regarded. To my mind, it meant distinctly to recognize the whole discipline and jurisdiction as previously in practice under the Second Book of Discipline, in all

points which had been *agreed upon* in the conference, as recorded by Spottiswood, while by positive enactment it rejected the article against Patronage, and in establishing the inferior judicatories which had been at first referred for consideration, set down some of the leading duties and powers for which they were intended, and particularly the duty of the presbytery as now come in place of the *superintendent*, both in other things, and specially in the matter of *collation* of ministers.

I can attach no importance to any criticism on the word *collation*. The passage in Sir George Mackenzie alluded to refers specially to the Episcopal Church, and assumes the *general* liability of the bishop or archbishop to letters of homing under the act 1612. That act is not quite clear. But if Lord Medwyn's construction of it be right, it did not involve *ordination*, which might make an essential difference in the question of jurisdiction. But I see no ground to doubt, that in the statutes the term *collation* always implies *ordination*, when the person is not already ordained.

In the very end of the act, after giving to the presbytery the exclusive power in collation, and to put order to *all* matters and causes *ecclesiastical*, according to the discipline of the kirk, it bears, "providing the foresaid presbyteries be bound and astricted to receive and admit whatsoever qualified minister presented be his Majesty or laic patrons." There is no doubt, that this clause effectually saved the rights of patronage. But they were only saved according to their true nature, and subject to all the powers and exclusive jurisdiction of the church courts, in the admission of the ministers so to be presented.

It appears to me, though I do not think it of much importance, that Mr. Bell proved incontestibly that this part of the act 1592 stands repealed. This is said to be an extraordinary proposition. But it seems to be established by the shortest and strictest possible process of logic. That act was *totally repealed* by 1612, c. 1. It was renewed by 1690, c. 5, *except that part relating to patronage*:—That part, therefore, *remained* under the previous repeal. The act 1690, c. 23, took away the old rights of patronage altogether, and vested the power of presentation in the heritors and elders. The 10th Anne repealed 1690, c. 23; but left 1690, c. 5, as it stood before. Consequently, it left the act 1592, as *revived* by it, in force in all points, *except the part relating to patronage*, which thus was *never revived*.

But, though the logic of the argument is perfectly correct, I do not attach great importance to it, except as it shews, that the pursuers had no right to lay their case in the summons upon that act. For, though the words of the act 10th Anne are not the same, they may be considered as of equal force, subject to a question as to the

words following the obligation, "*in the same manner*," &c. to be hereafter considered.

But, looking back to the whole effect of the act 1592, and taking it as making the law previous to 1612, I think that it must undoubtedly be read *along with the act 1567, c. 7*, which is ratified by 1581, and of course included in the express ratification of that by 1592.

Nor is there any difficulty in so reading it. It is, in my apprehension, nothing to the purpose that the court of the presbytery was not established by 1567. The presbyterian church was established, as recognized in all the acts, and especially in this act 1592. The superintendent had held the place which was now given to the presbytery. To him the presentation had been previously addressed; and if he refused to admit, the patron had his appeal to the *Synod and Assembly*, "by whom the cause being decided," was declared "*to take end as they decern and declare*." No doubt is here imagined, as to what the General Assembly was; and the act being expressly ratified, while the power of collation, and the power to put order to all matters and causes ecclesiastical, is now given to the presbytery, the meaning must be, that the sole power of admission lies with the presbytery, and that, though they are bound and astricted to receive and admit any qualified minister presented by a lawful patron, as the superintendent was before under 1567, yet the presbytery, being the sole judges in the first instance, if they refuse to receive and admit, the appeal must be to the Synod and Assembly, *where the matter must take end* as before. And it will be observed, that the act 1567 does not say, that this is to be the course of proceeding and result, in the special case of the superintendent finding the presentee *unqualified*, and far less limit the question of qualification to any defined rule of judgment. It is quite general, applying merely to the fact of his refusing to *receive* and *admit* the person presented. All is to take end as the General Assembly decern and declare. And the effect of the two statutes together must be the same, where the presentation is directed to the presbytery.

The next act 1592, cap. 17, strongly confirms this view. It properly relates to cases of *deprivation*, particularly on account of the incumbent holding any secular office; and, perhaps with some reference to this kind of qualification, it provides, that if the patron, after due notice of the vacancy, fails to present a qualified person within six months, the right of appointment shall devolve on the presbytery; and then it bears, in general terms, that if the presbytery *refuse to admit* a qualified person presented, "it shall be lawful to the patron to *retain the hail fruits* of the benefice in his own hands." Here is a *special* remedy provided, which manifestly proceeds on the supposition, that, if the church courts refuse to admit, there are no means of compelling them to do so. The

extent to which this right of retention may go is another matter. But the enactment of such a particular *mode* of vindicating the patron's right in any case, presents in a strong light the clear understanding, that if the church courts finally refused the presentee, no civil court could interfere.

The precise effect of this is not so clear. I cannot help thinking, that there is much in the view which has been suggested, though not by a legal authority, by a person who had well considered the subject, that, reading the three acts together, the meaning must be, that the patron should have right to retain the stipend *till the appeal should be finally disposed of* by the General Assembly; for, 1st, The whole arrangement, and the particular remedy given, suppose that the patron cannot force the admission; 2d, They suppose, that he cannot prevent the ordination and admission of another person than his presentee; and 3d, The act 1592, cap. 117, cannot mean, that the patron is to have right to retain *for ever* on his own understanding of his presentee's *qualifications*, or that *that* is to be matter for the consideration of any civil court. If any patron so proceeded, would this court take cognizance of the qualifications, in the face of all the statutes committing the trial of the qualifications absolutely to the church? No such case has yet been heard of; and as this is manifestly impossible, I cannot see how the matter can be otherwise extricated than on the principle so suggested. And it is not easy to make any difference in the question, between one sort of qualification and another, or between one cause on which the presbytery may reject and another. But it must always be kept in view, that the question may be altogether different, and may become purely *civil*, where there is a dispute as to the right of patronage, a competition of presentations, or a question as to the due exercise of the right within the time limited by law.

At any rate, every question as to the *admission* and *ordination* of a minister must stand on the act 1567. The right to the stipend, at least in the case of a disputed patronage, may possibly stand otherwise, however great the mischief may be; though I do not myself think that this consequence ought to follow.

So much for the act 1592. It established the whole constitution by kirk-sessions, presbyteries, synods, and General Assemblies, and most certainly sanctioned and recognized the General Assembly with large powers, judicial and legislative, according to the existing state of the church before—quite plainly on the Book of Discipline, *under exception of the points finally rejected*, as it had been approved of in the Assembly 1578. But whether it stood on the Book of Discipline or not,—the known and hitherto recognized platform of the church establishment,—beyond all doubt, the entire system of the courts, and their powers in all things ecclesiastical, both judicial and legislative, were fully acknowledged and firmly fixed. And,

accordingly, from that time to this, with the exception of the periods from 1612 to 1638, and from 1660 to 1683, that constitution has been in constant and vigorous operation in both departments, without any one attempting to curtail it by any such narrow view of the provisions of the act 1592, as that for the first time put forth by the pursuers in this cause.

I am, therefore, of opinion, that the power of the church, in the matter of admission, to require the consent of the people, and to resist intrusion against their will, stood firm on their own laws, as acknowledged by the acts of the state; and that it entitled them to refuse, as unfitted for any particular parish, any person who, after due trial before the congregation, did not obtain evidence of a reasonable concurrence or consent of the congregation, whereby there would be just ground to believe that he would not be a useful minister in that parish. How the Church courts might think it *expedient* to act in such a case is quite a different question.

Let us now inquire, in what manner that statute 1592 was acted on. The first authentic document which occurs is an act of Assembly 1596, which is recorded *verbatim* in the printed acts of the Assembly 1638. It seems to me to be very important. It is a proceeding never complained of, and relating to matters of the very greatest importance in the state of the church. It bears alike on the principle of non-intrusion, and on the acknowledgment of the power of the General Assembly to pass laws on all such subjects. The act, however it may be reflected on in reference to modern ideas, is full of many indications of a fervent spirit for the real interests of the Church and of the country. I will not fatigue your Lordships by reading all the words of the material part of it, though I do think them all of very great importance. It again announces the general principle, now treated so lightly—"Because by presentations, many forcibly are *thrust* into the ministry, and upon congregations, that utter thereafter that they were not called by God, &c." On which principle it assumes, that none should *seek* presentations without the consent of the presbytery—an idea no way inconsistent with the free exercise of the right of patronage, but perfectly in accordance with the Church's control over those subject to its own orders. Then it states broadly the distinction between mere learning and ability to preach, even with all the gifts of sincere conscience, and *fitness for the particular place to which the person is appointed*—making a plain difference, obvious to all common sense, between the qualifications of a man for the principal places of the realm, or extensive populous parishes (like Auchterarder,) and other ordinary places; and, assuming clearly the power of the Church Courts to judge in such cases, it directs "*The Assembly to take order herewith,*" &c.

I have never heard the validity of that act impeached, and the

practical sense of it no man can deny. But observe, that, passed within four years after the act 1592,—it is evidence, 1. Of the early and undisputed *practice* of the Assembly in passing acts as to the admission of ministers ; 2. That it was assumed to be beyond all doubt, that the Church Courts had a right to judge of *the fitness of the man for the particular parish*,—apart from his own literary and moral qualifications, as rendering him admissible into other parishes : and 3. That the right of the Church even to *prescribe specific grounds*, on which a presentee may be rejected in regard to a *particular parish*, though not objectionable in respect of any defect in literary or moral qualities, was held to be equally clear. Suppose a presentation to have been then given to a man to be minister of a large and populous parish ; and that, though not objectionable in respect of ordinary literary and moral qualifications, he was for other reasons believed to be unfit for the duties of such a parish : It is clear that the General Assembly 1596 held, that the Church had power to judge of that matter, and that, if the patron were dissatisfied, he could only appeal to the Assembly, and retain the fruits, in so far as the case, according to right construction, might admit of that remedy. In short, this act appears to me to be of very material importance, as it shews the view which was then taken of the meaning and effect of the statute 1592, and to be of far greater weight in evidence of the practice under it, than any single cases, of which imperfect accounts may be found, but the circumstances of which we have no means of investigating : There may have been hundreds of a very different character, of which there is no record preserved.

Passing over some things which had occurred to me on certain statements referable to this period, we come next to the *interregnum* of episcopacy, from 1612 to 1638. And I have only to say, that, while I have no particular information concerning the practice during that period, I can at any rate attach no importance to it : It was not the practice of the Presbyterian Church of Scotland.

But the act of Assembly 1638, when presbytery was restored, is both remarkable in itself, and very important in fixing the principles of the Church. That act ratifies the prior act of 1596, and embodies it at full length in its proceedings ; and then, in the report of a committee which touches on all the most interesting subjects which could then engage the attention of the Church, we have in the 20th article, which relates to the presenting of *pastors*, &c., the principle broadly laid down. “ That *there be a respect had to the congregation*, and that *no person be intruded in any office of the kirk contrare to the will of the congregation to which they are appointed.*”

An objection has been stated to the authority of the acts of that Assembly, in connection with the circumstances of the times in

which it met. I humbly think, that that is a subject which we had better not discuss in this place. It is enough, that it was afterwards declared to have been a lawful Assembly, and its acts legal, by act of parliament, and that they have ever since been held to be of good authority in the Church. The particular part of its proceedings, here referred to, is directed in large and careful detail to objects of the purest practical benefit for the Church and for the country. That the points to which its attention had been given are not enumerated in the act of the legislature, appears to me to be of no consequence.

It has been supposed, that the system of the *license* given to probationers, which has been long established, took its origin from the resolutions of the Assembly 1596. I do not know how that stands, but rather believe that the license was not introduced till some time later than even 1638, because the Acts of that year, though precisely on the subject of the qualifications of ministers, make no allusion to it. But this point of the license being mentioned, let me ask, what is the license? By *what* power has such a definite test of qualification, or such a qualification itself, been put upon the patrons? And from whence have proceeded the numerous acts and overtures in regard to the licensing of probationers, which are to be found in the records of the Assembly? It is a fixed and granted point, that no Presbytery is bound to receive, or take on trial, or admit, any presentee of a patron, unless he produces with his presentation a license to him as a man tried by some Presbytery of the Church, finding him qualified, and authorizing him to preach the gospel in any of the churches of the Establishment. How has this come about? Why may not a patron say to a presbytery, ‘I present this man—I think him *qualified*—no matter how he has got his qualification—you *shall* take him *on trials*—you are *bound and astricted* so to do?’ The Church have successively added to the requisites in a candidate for the ministry, Latin, Greek, Hebrew, Gaelic in particular districts, a fixed attendance on universities, &c. Now, would your Lordships entertain an action in this Court, to find the presbytery bound to receive, or *to take on trials*, a man who had no license, and who could not satisfy the presbytery as to his compliance with *their* rules as to attendance at a university, or in the other particulars? Yet where is the civil statute of the land, which lays the right of patronage, in express terms, under any such restraint? It seems, that nothing but such a positive enactment can stand against that right. But might not the patron say, ‘You *may* judge of my presentee’s qualifications, but you *MUST* judge; you cannot *delegate* any part of the power of judging to *another presbytery*; that is to give a *part* of the *power* of presentation to a third party, and a *reto* on my nomination. It is nothing to me that the General Assembly, and the presbyteries of the

church, have passed acts regulating this matter, and requiring these things as indispensable. I value not any such act, of however long standing. The church courts had no power to pass it, or so to circumscribe my civil right; and the act itself, and your proceeding under it, are equally illegal.' I see not how such a demand could be answered, consistently with the doctrine maintained in the present case. The cases, though different in facts, are identical in principle. The only good answer would be, that to the church is committed the exclusive jurisdiction in the admission of ministers; and that, as they alone have the right to judge of every thing relating to the *fitness* and qualification of any minister presented for the parish, so the General Assembly, by its legislative powers, has jurisdiction to control and direct the presbytery in all matters relative to that part of their duty. No one disputes the binding efficacy of their laws on this subject; and, when it is said that they are supported by expediency, I humbly apprehend that this gives up the astringent force of the statutes founded on in this case, and admits their liability to qualification by the judicial sentences, or the legislative acts, of the church courts in the ecclesiastical matter of the *admission* of ministers.

I believe it will scarcely be said, that this Court could interfere to compel a presbytery to grant a license to a probationer.

Returning from this digression, I proceed in the History. The next thing which occurs is the Directory of 1645. I own I was very much surprised when I heard this founded on by the counsel of the pursuers. It seems to me to be one of the strongest authorities against their argument, and really to rivet the law of the church as declared in 1638. It was not originally an act of the Assembly of the Church of Scotland. It is a Directory of the *Westminster Assembly of Divines*, who composed the Confession of Faith, and the Catechisms. It is quite true, that the particular point was debated in that Assembly, and that it was in some measure waived, for a plain reason. But the Directory was completed, and was offered to the Scottish Church. Considering the admirable nature of the works presented to them, and the great scheme in view, there must have been the greatest desire to accede to all. But see how this particular part of the Directory was received. The Directory generally was adopted by the General Assembly; but how? The act of Assembly prefixed to it shows, that it was only adopted under qualifications. "Provided, &c. it shall not be prejudicial, &c. "as also of the *distinct rights of presbyteries and people*, in the "calling of ministers; but that it shall be free to discuss and debate "these as God shall be pleased to give farther light." Now, observe, 1. That it was in contemplation of an entire union *by one system for England and Scotland*, that this Directory was proposed; and therefore *in so far as the Scottish divines or others differed*, the

question necessarily REQUIRED discussion. 2. That it gives what the pursuers speak of—the power of the people to object, if *they shew just cause of exception*. 3. That in that part of it which relates to ordination, it orders the *proportion of gifts in relation to the place* to be considered. 4. That it makes it necessary, that the presentee should preach to the people on three days, and then a competent number of them are allowed to appear before the presbytery, “to give *consent and approbation*,” or to *put in exceptions*. But, though this rather complicated system recognised the principle of the *call* in a certain form, the *Assembly of the Church of Scotland* were not *satisfied*, and *would not agree to it*; plainly for this very reason, that it did not require the *consent of the people as indispensable*. I think it a fatal document to the pursuers’ account of that part of the history. It shews, that the Church of Scotland held by the rule of the Second Book of Discipline, and the recent act of 1638, and would not surrender it, *even in the prospect of the Union*.

I come now to the Act of *Assembly 1649*. The act of the estates 1649, after abolishing all the laws of laick patronage, “declares that “it shall be lawful for the presbytery to plant “kirkes that are vacant, and to present on the sute or calling, or “*with the consent*, of the congregation, *on whom none is to be “obtruded against their will*,” thus repeating the law of the presbyterian church from the beginning, and confirming it as declared in the Assembly 1638. It then recommends to the General Assembly to establish a settled rule as to the manner of the appointment and admission, and what should be accounted the congregation. The act of the Assembly followed. The terms of it have been so often quoted, that I will not read them at length, though I account them to be of very great importance, and quite incapable of misconstruction.*

In substance, the act provides, that the kirk session or elders shall elect or nominate the person—that he shall be presented to the people—that if the people *acquiesce* and *consent* to the said person, “then *the matter* being reported to the presbytery, &c.,” they are to proceed to make trial of his qualifications, and admit him to be minister of the congregation. But if the *major part* of the congregation *dissent* from the person proposed, “*the matter* is to be “brought into the presbytery, who shall judge of the same; and if “they do *not* find their dissent to be grounded on *causeless preju-* “*dices*, they are *to appoint a new election*, &c.” The just force and meaning of this are plain enough upon the words; but it is impossible duly to estimate them, without connecting that clause with what follows: “But if a *LESSER part* of the congregation of the “session or congregation shew their dissent from the election, *with-*

* See the whole words in Mr. Bell’s speech, p. 142.

“ *out exceptions relevant and verified to the presbytery,*” the presbytery shall proceed to the trials and settlement: “ Yet all possible tenderness and diligence must be used to bring all parties to an harmonious agreement.”

I should have thought it impossible to misapprehend this act, in the material part as to the necessity of a consent *express* or *implied* of a *majority* of the congregation, however to be defined—subject only to one qualification reserved to and laid on the church itself. It will not do to look at the clause as to the *majority dissenting* by itself, and reason on it as if it stood alone. Quite decidedly, there is a rule given for a case of dissent by the *majority*, *DISTINGUISHED* from that of a *minority* dissenting. The only question is, *what* the distinction is? But the antithesis, manifestly, is not on *time*, but on the *fact* of a *majority*, or a *minority*, dissenting—and the consequence laid down in each case. *Why* is this distinction taken? If, in *all* cases, the dissenters were to *lodge* and *verify* good reasons, why distinguish the one case from the other? There *must* be a *difference*. But not a word is said of the *time* of the presbytery judging—nothing of the proceeding being *staid* in the one case more than in the other. Indeed, one view has been taken, which supposes, that, in the construction of the act, objections might be listened to from a *majority*, which would not be listened to if proposed by a *few*. This seems to grant the whole point. It cannot mean, that the majority must give in objections *relevant* or *verified*; for these would be equally good if stated by *one* man as by a *hundred*. It must be something *less*; and what can that be, but the mere *negative* condition, that the presbytery do *not* find the dissents to arise from causeless prejudices? Objections from want of the Gaelic language, a weak voice, a weak body, or the like, are said to be admissible causes in this view, as *unfitting* a man for the particular place. Why not the cast of mind—the age and habits of the man—inefficiency in preaching—and many other real and important qualities in a minister, which it would be impossible to condescend upon and prove, though equally true and substantial, to exclude the inference of causeless prejudice. But, in reality, the important point is, that the provision as to the *majority* dissenting changes the *onus probandi*. In the other case of a *minority* dissenting, objections *relevant* and *proved* are necessary. In this case, no *such* objections or *proof* is required. It is laid on the presbytery to say *positively*, whether they can find that *it is* causeless prejudice; and it is evidently not meant, that the majority must give in reasons, or *prove* any objections *relevant in themselves* for rejecting the presentee. The *matter* to be taken to the presbytery in that case is simply the *fact* that a *majority* dissent; they are to judge of *that*, as in the previous case of all the congregation assenting or not objecting. And the purposes for which the matter is to be so taken to the

presbytery, are apparent, 1. To judge of any question as to the *fact* of there being a majority dissenting; 2. To consider and inquire, whether it proceeds from causeless prejudice, not by requiring special exceptions or proof, but by simple communing, that the prejudices may be removed, or, if ascertained to be causeless, the dissents may be so far overruled; but, 3. That all diligence may be used to bring about harmony, whether the dissatisfaction appears to proceed from causeless prejudice or not. But still it is left exclusively to the presbytery, in this part of their duty, not at all to find whether there are relevant objections proved or not, but to find simply, whether the majority are actuated by prejudices absolutely causeless—a thing resting in their minds, and not in any question as to the literary or moral qualities of the presentee. And, as all depends on the judgment of the presbytery in this mere negative, and no special reasons are required, it is a complete negative on the *patron* or *electors*. For supposing the matter of a dissent by a majority to be taken to the presbytery, and that they did *not* find that it was grounded in causeless prejudices, and said nothing more than simply recording the fact of such a state of dissent existing, and that in respect of it they rejected the nominee, and appointed a new election, it is evident that the proceeding under that act would have been complete; and so it would be a plain *negative*, without any special reasons assigned.

The act of the estates is repealed, and the act 1690 changed the right of *nomination*. But the directory 1649 never was repealed by the Church. I shall presently enquire how far it is superseded. But in the meantime, it is in vain, with this standing in the acts of Assembly, to say that the idea of a *negative by a majority*, as a *test* of the congregation *consenting* or *not*, is a thing never heard of before.

Take it with the rule of *non-intrusion*, which is express in the act of the estates: The dissent of the majority proves *intrusion*, unless it be shewn *positively* that it arises from *causeless prejudice*. Suppose, then, that the act 1834 had been the *same*. To make it so would have required no change, but substituting the *patron* for the *session*, and the *not finding it causeless prejudice* for the *solemn declaration*. The arguments of the pursuers against it would be nearly the same as they are now. Indeed, the presbytery could scarcely have found it to be *causeless prejudice*, if the persons solemnly stated *what* is in the *declaration* of the act 1834. That declaration may be imagined to be nugatory. But a case *has actually occurred*, in which a majority dissented, and certain of the persons dissenting *would not take* the declaration, and the presentee was settled.

Reference has here also been made to a passage in the pamphlet to which I formerly alluded. Having already said perhaps too much on that subject, I will not resume it, though I had put down some observations in my notes. To me it is, with deference, ap-

parent, that there is in the passage just one of those inaccuracies which the author anticipated might be found in his sketch. It is not an opinion on the construction of the act, and does not profess to be so, but an incorrect statement of the *fact*. The act is not in the terms there set down; and, so far as it is necessary, and we are competent to do so, we must form our own judgment of its import. But it does appear from the context, that the author saw very well, that, in giving weight to the dissent of a *majority*, the act placed the matter on a very different footing, from a mere right of objecting for reasons to be proved by any individuals of the congregation.

It has been said, that the year 1649 was a bad time. I am sure I shall not say that it was a good time. All I have to observe on that is, that for the presbyterian Church, at least, it was a better time than that which succeeded it. Obloquy may be thrown on such men as Rutherford, Baillie, Calderwood, Gillespie, Smith, or Wood, the persons who, under great embarrassment from difference of opinion on the point of *election*, were the authors of this act; because of the errors they may have committed in the turbulent times in which they lived. But they are names, which in spite of all errors, will hold their place as faithful servants in the annals of the country, as long as the presbyterian, or, let me say, the Christian Church exists. Some of them were among the men who assisted in composing those marvellously profound and accurate works, the Westminster Confession of Faith, and the Catechisms connected with it; and, whatever faults their zeal in such a time may have led them into, the writings which they have left behind them shew them to have been actuated by the deepest principles of Christian devotion and piety.

I do not know how the act of Assembly was acted on. We have no authentic records of that period. I can very well suppose, that in individual cases which may be discovered in particular districts, the order of the directory might not be accurately observed. Yet, if I rightly followed the statements of Lord Medwyn, it just came to this, which was very likely to happen, that the *heritors* took all upon them for the people. We need not wonder at any peremptory order of Cromwell, where anything might be found to cross his views.

But, in general, I would observe, that though it would be perfectly just to look at the conduct of the body more than at their words, *if we had before us the whole of the practice, and all the circumstances*, it is, in my opinion, quite contrary to all correct principles of reasoning, to attempt to set aside the solemn declaration of rules and principles embodied in a statute, by isolated examples of the rule of the statute having, in such times, been partially departed from or neglected.

What is obtained in this argument from the act of Assembly 1649,

is a plain, clear, example of a *negative* by a *majority* of a *congregation*, the *character* or persons of which were *to be defined*, as distinguished from objections by a *minority*. It is not said, that the act of 1834 is *exactly* the same, though I believe that practically it nearly is so. But the act 1649 brings out clearly the principle, of taking the *negative dissents* of a *majority* as a safer and *far less* *astringent* test of intrusion, than what seems very strangely to be set up against it, or attempted to be treated as different in principle, by the friends of *uncontrolled* patronage, the requisition of a *positive consent* of the majority, or any given proposition of the defined congregation. The act 1649 gives this example; and it is valuable for real use, however it may be stigmatised by abstract reasonings, as if it were equivalent to the extinction of the right which it only regulates and moderates. The experience of all the world proves this: The experience of scarcely four years under this very act 1834 has incontestibly proved it.

The act 1649, as a directory, was never repealed by any act of the Church. The general act rescissory 1661 has been alluded to. There is not in it a single word, which can with propriety be applied to any act of the General Assembly. At any rate, that and all the other acts, which re-established Episcopacy, and extinguished the General Assembly, and all acts prejudicial to the presbyterian church government, were to that effect repealed by the act 1690, c. 5; and all the presbyterian ministers, who were extruded for non-conformity to the Episcopal Church, were at the same time restored. Nevertheless, I do not mean to say, that the act of Assembly 1649 was, at the date of the act 1834, in actual force. If it had been so, there probably would have been no necessity felt for any other. But, though it never was maintained to be in actual force, so that without any other procedure it could be at once acted on, I always understood, that it was held by the most learned of all parties in the Church to be still a part of its law, notwithstanding that the power of nomination given by it to the session had fallen, and returned, after some vicissitude, to the patrons. This I find will not be granted since we got into this keen controversy. I do not wonder at it. It is a dangerous point. The argument against the existing force of the act is not unreasonable, though I doubt its soundness. But still it stands in the Statute Book of the Church, as a monument of the views of very eminent men of the Presbyterian Church, concerning the just and reasonable limits under which the right of patronage as a trust might safely subsist.

We pass over the darkest passage of our history, from 1660 to 1688; and come to the proceedings at the era of the Revolution. For I own, my Lord, that, whatever others may think, I can never refer to any practice in that period, in regard to the rights and liberties of the presbyterian people of Scotland. I know well, that there were men of high name and great worth even in that melan-

choly time, such as the amiable, and pious, and eloquent Leighton. But it is nevertheless certain, that no nation ever groaned under a more ruthless tyranny than the people of Scotland then did, till their deliverance was achieved by the great and good king William the III: And though I believe it is true, that at first he had impressions adverse to the views of the leading men of the Church, he was too wise a man not to listen to sound advice, when he was made aware, that all the strength and safety of his throne in Scotland depended on the Protestants of the Presbyterian Church.

The first thing which then fixes attention is, that by the claim of right, and the letter of the estates, tendering the crown of Scotland to King William, it was in substance made an indispensable *condition*, that prelacy "and the superiority of any office in the Church above presbyteries," should be abolished, and of course the Presbyterian Church government re-established, "they having *reformed from popery by presbyters.*" Then came the acts of 1690, chap. 1, which rescinded the act 1669, c. 1, "as inconsistent with the *order of church government* now desired," and in doing so, settled a leading point of very great importance. It has not been printed in this cause; but it is in these terms: "Our Sovereign Lord and Lady, the king and queen's majesties, taking into consideration, that, by the *second* article of the grievances presented to their majesties by the estates of this kingdom, it is declared, that the first act of the 2d Parliament of Charles the II. entitled '*Act asserting his majesty's supremacy over all persons and in all causes ecclesiastical,*' is inconsistent with the establishment of church government now desired, and ought to be abrogate: Therefore, their majesties, with advice and consent of the estates of Parliament, do hereby *abrogate, rescind, and annul* the foresaid act, and declares the same, in the whole heads, articles, and clauses thereof, to be of no force or effect in all time coming." The question, therefore, as to any claim of supremacy in the Presbyterian Church, was at once set at rest for ever. The next act 1690, c. 2, restored the presbyterian ministers who had been extruded in 1661; and after that we come to the important statute 1690, c. 5. for "ratifying the *Confession of Faith, and settling presbyterian church government.*"

I rather think that sufficient attention has not been paid to this statute, which is the true charter of the liberties of the Church of Scotland. It bears, that the king, queen, and estates of parliament, "conceiving it to be their bound duty, after the great deliverance that God hath lately wrought for this church and kingdom. *in the first place to settle and secure* therein the true Protestant religion, according to the truth of God's word, as *it hath of a long time been professed within this land:* As also the government of Christ's church within this nation, agreeable to the

“ word of God, and most conducive to the advancement of true
 “ piety and godliness, *and the establishing of peace and tranquil-*
 “ *lity within this realm:* And that by an article of the claim of
 “ right it is declared, that prelacy, and the superiority of any office
 “ in the church above presbyters, is and hath been a great and insup-
 “ portable grievance and trouble to this nation and country, and con-
 “ trary to the inclinations of the generality of the people ever since the
 “ Reformation, they having reformed from popery by presbyters, and
 “ therefore ought to be abolished; like as by an act of the last
 “ session of this parliament prelacy is abolished.” Then it rati-
 fies all the laws and statutes for the preservation of the Protestant
 religion in the kingdom: It next ratifies and establishes the
 Westminster Confession of Faith, which is subjoined to the act, and
 which in article 25th declares, that “ there is no other Head of the
 church but the Lord Jesus Christ,” at the same time that in article
 23d, it fully acknowledges the authority of the civil magistrate.
 After this, it *ratifies, establishes, and confirms* “ *the presbyterian*
 “ *church government and discipline;* that is to say, the government
 “ of the church by kirk-sessions, presbyteries, provincial synods,
 “ *and General Assemblies,*” ratified and established by the act
 1592, c. 16., “ *and thereafter received by the universal consent of*
 “ *the nation,* to be the only government of Christ’s church within
 “ this kingdom, reviving, renewing, and confirming the foresaid
 “ act of parliament in the whole heads thereof,” *except the part*
relating to patronages, to be afterwards considered. It repeals all
 acts adverse to the presbyterian church. It restores the extruded
 presbyterian ministers. It appoints the first meeting of the General
 Assembly—which was evidently necessary in the circumstances; but
 beyond this, it “ allows the general meeting and representatives of the
 “ foresaid presbyterian ministers and elders, in whose hands the
 “ exercise of the church government is established, either by them-
 “ selves, or by such ministers and elders as shall be appointed, and
 “ authorized visitors by them, ACCORDING TO THE CUSTOM AND PRA-
 “ TICE OF PRESBYTERIAN GOVERNMENT, *throughout the whole king-*
 “ *dom, and several parts thereof,* to try and purge out all *insuffi-*
 “ *cient,* negligent, scandalous, and erroneous ministers, by due
 “ course of ecclesiastical process and censures; *and likewise FOR*
 “ REDRESSING ALL OTHER CHURCH DISORDERS.”

This statute completely re-established the presbyterian church in
 its vigour. And, while it ratified the act 1592, and vested in the
 General Assembly the most ample powers in all matters ecclesiasti-
 cal, it made its jurisdiction generally to depend, not on special acts
 of the legislature, but broadly on “ *the custom and practice of pres-*
 “ *byterian government*” throughout the kingdom—that is, on the laws
 and practice of the church. From that day to this, the presbye-
 rian church, through its assemblies and inferior courts, has been in

the undisputed enjoyment of the fullest powers of making laws, not only for their internal government and order, but for the general interest of the church, and specially for instructing, and directing, and controlling the inferior judicatories, in the execution of the various powers and functions entrusted to them in every department of ecclesiastical affairs. And I apprehend that it cannot admit of any dispute, that whatsoever the presbyteries have power to do in things which do properly belong to their spiritual or ecclesiastical functions, in all such things the General Assembly have power, by acts regularly passed according to law, to direct and instruct them in the mode of discharging the duty.

I cannot, after all this, think it in the least doubtful, that the church, by these various assemblies, is supreme in all matters ecclesiastical, and has the most ample powers, to regulate all such things from time to time by acts of legislation; and that the idea of their being in any measure limited in these powers, by the particular clauses of the act 1592, or any other statute, is altogether groundless. In the course of ages, they have reared for themselves a code of laws, incorporated in their voluminous records; and they have changed and added to them from time to time. And no man has ever doubted their power to do so. I believe, that this is the very first example in the whole history of the church, of an act of Assembly in matters belonging to the ecclesiastical functions of its presbyteries or other subordinate orders in the church, being attempted to be challenged in any civil court.

And, after having brought the deduction to this point, need I ask, my Lord, whether a church so formed and consolidated equally by statutes and by the usage of centuries—the security of which was made an indispensable condition of the revolution establishment—an equally indispensable condition of the union of the kingdoms—and the first sworn duty of every sovereign who is called to the throne,—is not something more than a mere corporation with power to make bye-laws—whether it is not an essential and component part of the constitution of the realm, whose independent powers, judicial and legislative, are even more sacred and inviolable, than the powers and jurisdiction of the highest civil and criminal courts of the country. These may be changed or taken away, as they have often been. The others cannot be invaded in any vital point, without a direct breach of what is fundamental and essential in the political state of the United Kingdom.

I come now to consider the act 1690, c. 23. The inferences drawn from this act appear to me to be rather singular. The leading point in it is, that on certain specified terms, it took away the rights of patronage as they had formerly stood, and vested the right of presentation in the heritors and elders of each parish. And it may be observed, that, in saving the interests of ministers in

possession, it abstains with most remarkable care from touching any thing that is *spiritual* or *ecclesiastical*, confining the provision to the *temporalities* of the benefice alone. But, while this act gave the right of appointment to the heritors and elders, were the *people* even in this arrangement disregarded? Were they to have no voice at all in the matter? The act bears that the heritors and elders were “to name and propose the person to the *whole congregation*, “to be either *approved* or *disapproved* by them.” The test of approbation, or the effect of a disapproval, is a separate matter. But in the first place, is this not a recognition of the principle, that, even where the heritors and elders were to present, there *must* be a *consent* or *approval* by the congregation? Why so propose the person to them? If they had special objections to the person named, they could state them at any rate. But why by statute *enjoin*, that he shall be proposed to the congregation, to be “*approved*” by them? I cannot answer the question otherwise than by the fact, that it was a known principle of the church, that every person, before being ordained and admitted to the pastoral office in a parish, must be so proposed for the consent or approval of the people; and it only renders the point stronger, to state, that the same principle has almost universally prevailed in other Protestant churches. The effect and the regulation of it belong to our own church.

But the act farther bears, “that the disapprovers give in their reasons.” I have doubt, whether this meant any thing more, than that *individuals*, or a *minority* of the congregation, should give in their reasons, with an implied reference to the Act of Assembly 1649, assuming that if a *majority* disapproved, the *approval* required was not obtained. But it may not have been so; and the words may have the construction, that in all cases the disapprovers were to assign reasons for their dissatisfaction. Taking it to be so, to *what effect* was this to be done? It is “*to the effect* the affair “may be *cognosced upon by the presbytery of the bounds*, AT WHOSE “JUDGMENT, AND BY WHOSE DETERMINATION, THE CALLING AND “ENTRY OF A PARTICULAR MINISTER IS TO BE ORDERED AND CON- “CLUDED.”

How this express enactment could be overcome, or how, in the face of it, this Court could take cognizance of any such question, if the act 1690 were clearly in force, I know not. For it makes the whole transaction *by statute* an ecclesiastical matter, under the *exclusive* jurisdiction of the church. At the same time, it never was or could be held, that it excluded the review of the superior church courts. Accordingly, very numerous cases came before the Assembly on such questions, between the years 1690 and 1712. Those questions were in general of a very different nature from the questions on the sufficiency of the call, which afterwards occurred.

They were most commonly *competitions* between two parishes, each desiring to have the same man. For, in consequence of the calamities which had befallen the Presbyterian Church after 1660, there were very few qualified persons to supply the wants of the country; and the constant struggle was, to retain a minister who was already in a parish, or had been first named for it, and, on the other hand, to obtain his services for another place represented as a more important station. In all such cases, the church exercised without controversy its undoubted power, to determine in *which* of the two parishes the person should be the minister. Other cases, however, did occur in the period, which related properly to the moderation of the call; such as *Kelso* in 1705, *Bunkle* and *Preston* in 1706, and various others; clearly shewing, that the right of *review* by the superior church courts over the proceedings of the presbytery was understood to be fully preserved.

But the most material thing by far is the principle incorporated in the act, that, though the right of *presentation* was vested as effectually in the heritors and elders, as it ever was in any other laic patron, it was still rendered indispensable, that the presentee should be proposed to the people for their *approbation* or *disapprobation*. I apprehend, that this provision fully recognises in the civil statute the principle, that a certain consent of the people is necessary to the formation of the pastoral relation; and, while it suggests that those dissenting shall give in their reasons, it still leaves the presbytery and the superior church courts (as it will appear they were uniformly held to be) the absolute judges *both* of the *reasons* stated, if any should be stated, and of *the approbation given*, and of *every other matter* “in the *calling and entry* of every particular “minister.”

But it may not be improper here to consider the case which so frequently occurred, of the church refusing to allow a man to be transported or translated from one church to another. I believe that the cases of this kind were very numerous from 1690 to 1712. Then, on what principle can they be explained, consistently with the theory of the pursuers? Here is a clear presentation by a legal patron, to a person certainly having all the ordinary qualifications, being already a minister of the church. Then, why is it, that the presbytery to whom the presentation is offered are not *bound and ascribed* to proceed forthwith to receive and admit him—to take him on trials, and then induct and collate him? There is a very clear answer, but not in any Act of Parliament. All the Acts of Parliament *have an implied reference* to the *existing state* of the church, and the known laws by which they must be guided. Wherefore, the established rule, that, unless the presbytery under whom the man is already settled, or the General Assembly by their paramount authority, consent to loose him from the one charge, no

other presbytery can be warranted to act on any presentation for his admission and induction into another. Perhaps those who look to the interest of the individual, more than to the great end of the ministry, may think this severe. But it is the fixed law of the church, which surely no civil court can interfere with ; and, though the supply of able men for the ministry has in modern times rendered it of little operation, it is by no means entirely in abeyance. In former times, it was of very frequent occurrence ; and in very many instances, the Assembly refused to permit a man to be removed from one parish to another, solely on the ground of the inexpediency of the change. The imperative force of a presentation had not then been discovered by the patrons or presentees.

But to return to the Act 1690. Mark, now, the clause relative to the appointment and admission of ministers in Royal Burghs. The use of the word “calling,” signifies little, however it may be understood,—because there is no doubt that it was frequently used to signify the appointment, election, or nomination. But observe the time to which the act refers for the rule of admission in that case:—It is to the use “*before the year 1660.*” This is pretty good authority for casting aside any practice between 1660 and 1690. It seems to me to put that case, in so far as regarded the *consent* or *concurrence* of the people, distinctly under the practice, whatever it was, after 1649. I really do not at present know what that was, as neither the act of the estates, nor the act of Assembly, 1649, particularly mentions the Royal Burghs. I should rather think, that they were under the operation of that law ; in which case, this clause of the act 1690 is a direct recognition of that act, in so far as it could be applied. At all hazards, it excludes all practice after the year 1660.

In every view, it is a clear point under this act, that the whole matter of the *approval* or *disapproval* “was to be cognosed upon “by the presbytery, *at whose judgment*, and *by whose determination the calling and entry* of a particular minister is to be *ordered* “and *concluded.*” This is the turning point of the act 1690. It certainly says, that the disapprovers shall give in their reasons : *They* might be many or few. But it first provides, that the person shall be proposed to the *whole congregation* to be *approved* by them. Surely, this has some emphatic meaning ; it must intend, that *some* approbation was expected, and could scarcely mean, that *three* persons in *three thousand* should make up that approbation. But, granting any other construction, however contrary to the sense of the thing, the act fixes this point, that, in *every thing* relative to the *calling and entry* of a minister, the determination of the presbytery shall be *conclusive*. It is no matter, then, what the reasons of disapproval might be : It is no matter in what form they might be presented : The provision of the act is not confined to literary

and moral qualifications, nor to *qualifications at all* : The right and power are absolute, that, at the determination of the presbytery, “ the *entry and calling* of every minister is to be *ordered and concluded*,”—and this with an *express* reference to the *approval or disapproval* of the congregation. It is even much stronger than the provision of finality in the act 1567.

The last statute necessary to be considered is the 10th Anne, c. 12. Meaning to restore the rights of patronage to the former patrons, in so far as they had not been actually purchased by any of the parishes, it begins with repealing the act 1690, c. 23. But it leaves the act 1690, c. 5, in full force. I have already observed, that, by strictest consequence, the effect of this is to ratify of new the act 1592, *except that part of it which relates to patronage*, and which it leaves to stand *repealed*. But it is of much more importance to observe, that it necessarily held all the acts of Parliament ratifying the Presbyterian Church government, and the powers and jurisdiction of its courts, to be fully confirmed. Indeed, the Scotch act 1705, c. 4, had expressly *prohibited* the commissioners for the Treaty of Union even to “ *treat of or concerning* any alteration of the worship, discipline, and government of the church of this kingdom as *by law established*.” And the *Act of Security* 1706, cap. 6, had rendered this definite and unalterable.

It appears to me very extraordinary, that any one should think, that this act of 12 Anne has the effect of abolishing the call by the people altogether, and rendering no consent by them, or proposal to them for approbation, necessary. It no doubt, in the preamble, uses the word *calling* ministers. But this evidently has reference to the *right of presenting*, which, by the act 1690, had been vested in the heritors and elders. The simple reading of the words must shew this ; and, though the same term was used in the act 1690 itself, that did not supersede the necessity of approval by the people to be judged of by the presbytery. And, accordingly, it is the *right of presenting* which is restored to the patrons.

I think it clear, therefore, that the only question of importance, which arises upon this act, is upon the words in the end of the first section. “ And the presbytery of the respective bounds, shall, and is hereby obliged, to receive and admit *in the same manner* such qualified person or persons, minister or ministers, as shall be *presented* by the respective patrons, *as the persons or ministers presented before the making of this act ought to have been admitted*.” It is said, that this must refer to the times when patronage was in force ; which is interpreted to be before the act 1690. Why so ? I can see no reason for this last inference. It appears to me, that the plain import of the words, and the obvious sense of

them, are, that the clause refers to the manner in which ministers presented ought to have been admitted *immediately before* the passing of this act of Queen Anne; the single difference being, that the heritors and elders were then the *patrons*, and might have *presented* if they pleased. It can make no difference that the act 1690 is repealed. I am sure, that all the acts giving patronage under the Episcopal Church are equally repealed. But the rule laid down is, that the persons shall be admitted in *the same manner* as they *ought* to have been admitted before the passing of the act,—that is, while the act 1690 was still in force. If this construction, which accords perfectly with the words, is right, the consequence must be, *first*, That, though the presbytery are obliged to receive and admit any qualified minister presented by the patrons, as they were before when he was presented by the heritors and elders, he must still be proposed to the people for their approval or disapproval; and, *secondly*, That the presbytery have the sole jurisdiction to determine every thing in the *calling and entry* of a minister. There is no other rule of induction given; and, holding this to be the true construction, I infer, that still some consent or call by the people was necessary. The more indeed that this point is considered, it will, in my apprehension, appear to be the clearer.

I am aware that the authority of Lord Bankton has been referred to on the subject—a very feeble authority, in my humble opinion, on such a question—no high authority in matter of opinion on any point; but least of all here. Let us look at the ground assigned, for a construction apparently so opposite to the plain interpretation of the words. It is, that “by the act 1690 the person named or “presented by the majority of the heritors and elders, behoved to “be presented to the congregation, to be approved or disapproved “by them; and if they disapproved, the presbytery were to *cognosce and determine therein*. It may therefore be doubted,” says “the author,” “whether the same method must still be followed. “I conceive neither *people* nor *presbytery* can obstruct the settlement, except upon *objections to the presentee’s life and doctrine*, “and that the method in the act 1690 is not now the rule.” The learned author interprets justly the act 1690; but, having evidently a great aversion to it, he just sets it aside for this reason and no other, that it would *infer* that still the *consent of the people must be obtained*, and that the *presbytery would have the sole right of judgment*; for which singular reason he throws it back upon the practice of *Episcopal* times, according to which it was not possible that the admission could be proceeded in, there being no bishops or archbishops left, and the right of *acting and judging* being of *necessity in the presbytery*, which he desires to repudiate, and in the General Assembly, which the repealed acts of Charles the Second

had entirely extinguished. But the author does not in the least disguise the matter; for he tells us plainly his reason for the opinion. He says, he thinks the *manner* referred to must be the manner before the patrons were deprived of their ancient rights; "and if it were otherwise, the *presbytery would have it in their power* to set aside the presentation, *upon suggestions of the people, which was not intended.*" I know not what was *intended*; but I take the act as it is. I accept Bankton's paraphrase on the act 1690; and I say, that the act *does express the very thing*, which he, to avoid a disagreeable inference, is pleased to assume was not intended. The words are quite plain: the sense equally so. The words are, "to receive and admit in the same manner," &c. "as the persons," &c. "*ought to have been admitted,*" &c. "*before the passing of this act.*" By what rule of interpretation is this to be carried back twenty-one years, in order to catch a rule of Episcopacy long extinguished, and which by no *possibility* *could* be applied to the case? One of your Lordships seemed to go rather farther, and to think that the *manner* must be that of the reign of *popery*. How that is to be applied, I know not. I am sure, that in that case our presbyteries and General Assemblies may shut their doors to such cases, and surrender all into the hands of the patrons, and such ecclesiastics as they may find fit for such a duty.

The plain reading, with submission, is the true one. It is "*before the passing of this act,*" which surely means *immediately before*. And where is the difficulty? The right given to the heritors and elders was nothing else than a *right of patronage*: *A price* was to be paid for it: *Some parishes did pay it.* It might or might not be exercised by *presenting*; and the words "*ought to have been*" seem to have reference to the fact, that the heritors had frequently allowed the matter to be settled by a call at large. But what is this to the purpose of the words of the statute? I humbly think them quite clear and explicit; while the only other interpretation proposed would render the act unintelligible and incapable of execution. For when Episcopacy stood abolished, the ministers could not possibly be admitted *in the manner* practised by that church, under which, by the statutes 1662 and 1669, the General Assembly of the Presbyterian church had no existence. And was it ever heard of as matter of *fact*, that the ministers *were admitted* under the act of Queen Anne, in the manner of the Episcopal church? It is to me the most incomprehensible notion which has been suggested in this extraordinary cause.

But, if the manner of admission referred to is not that which ought to have been followed *immediately before* the passing of the act itself, I see no other way in which it can be justly construed, but that it must refer *either* to the manner which ought to have been

observed before the overthrow of the Presbyterian church in 1660,—that is, according to the rule of the act of Assembly 1649,—or *otherwise* that we must resort to the idea that, under this word “before,” it meant to go back a whole century, to the rule of induction under the act 1592 before the passing of the act 1612. And, on either of these constructions, I think it evident, for the reasons which I have already explained, that the pursuers could obtain no benefit. For I have no idea that it could mean, without saying so, that the *presbytery* was to receive and admit *according to the usage of Episcopal times*; and far less that it could mean, that they were to induct according to the practice of the *popish* church.

Whatever was the true meaning of the statute in this point, I hold it to be clear, that it implied that the person should be presented to the people for their consent or disapproval, according to the practice of the Presbyterian church at all periods of its history. That it does not mention this seems to be of little importance: IT MAKES NO MENTION OF THE TRIAL OF THE QUALIFICATIONS OF THE PRESENTEE; and yet no one can doubt, that that remained with the *presbytery*, subject to the review of the General Assembly. There was no *bishop* or *archbishop* for that duty.

But, independent of all the considerations which I have hitherto suggested, this matter appears to me to be absolutely closed and settled by the *practice* ever since the date of that statute of Queen Anne.

Here I cannot but think it very surprising, that any one should doubt the *fact*, that a call or concurrence of the people was, from that time downwards, a regular and essential element in the process of induction. I should have thought, that the act of Assembly 1782 was enough to settle the point as matter of fact. It “declares that “the *moderation of a call* in the settlement of ministers is agreeable “to the IMMEMORIAL and *constitutional practice* of this church, “and ought to be *continued*.” This declaratory act was moved by the late Dr. Macknight, of whom it has been justly said, that his name is in all the churches. But it is remarkable, that the motion set against the resolution, which formed the basis of this act, was in these words: “That the Assembly declare, *that the “moderation of a call is agreeable to the IMMEMORIAL practice of “this church*, but not having sufficient evidence laid before them “that *any presbyteries have departed so far from established usage “as to lay aside the moderation of a call in the settlement of a “minister, dismiss these overtures as at this time unnecessary*.” This establishes, that it was *then* the *unanimous* resolution of the Assembly, that the moderation of the call was, according to the *immemorial* usage of the church, a necessary part of the process of admission, which no presbytery could dispense with.

I should have thought this, without any other authority, sufficiently decisive of the known practice of the church, both as to the fact of the moderation of the call being indispensable, and of the precise nature and character of that proceeding, as it was well understood by all parties in 1782; and I should scarcely have expected, when it is not and cannot be disputed, that the same practice has continued down to the present hour, that any doubt could be raised, as to the nature or legal necessity of the moderation of the call by the presbytery, in the discharge of their ecclesiastical duty. And if any confirmation of the act 1782 were necessary, it is found in the case of Arbroath in 1790, in which the Assembly expressed their *high disapprobation* of the conduct of a presbytery, in having inducted a minister without the moderation of a call. No other instance of the kind has occurred since that time.

Nevertheless, the pursuers, taking advantage of the circumstances, that the word *call* had in former times frequently been used to signify the nomination or appointment, and that, under the act 1690, the heritors and elders, instead of always using a presentation, had frequently allowed the settlement to take place by a call signed both by themselves *and by the heads of families*, endeavour to confound the whole matter, and to represent that which, for at least more than a century has been well known and understood by the call, and the nature of which was clearly fixed by Principal Robertson when he gave it the name of the *concurrence*, as truly not a part of the process of induction at all. This renders it necessary to look into the actual state of the practice since the date of the act of Queen Anne.

I shall not fatigue your Lordships by going minutely into the details of the practice between the years 1712 and 1736, as they were explained by the Solicitor-General. They all shew a constant struggle between the effect of a presentation, and the insufficiency of the call. It is very true, that in many cases the right of presentation was not exercised. But still the cases which did occur show the principle, some of them in a very remarkable manner. In the case of Lochmaben in 1723, the presentee was rejected by the Commission, though 123 parishioners concurred in the call, and the presbytery was appointed to moderate in a call to another. The Assembly laid aside both; and all that the Lord Advocate maintained for the crown as patron was, that the presentation with a popular *concurrence* of a *majority* gave the right. In the case of Aberdeen in 1725-26, the Commission had authorised the settlement of a minister, and the Assembly found, that they had done wrong in having disobeyed orders by *not giving due regard to the inclinations of the people*. Yet as the minister had been settled, they refused to loose his relation to the parish. Even against that

sentence, it is stated, that there was a dissent entered by no less a person than the Lord President Forbes, because the inclinations of the people had not been attended to.

But without going further into the practice of that period, I come now to the act of Assembly 1736. And it is really of so striking a nature, that I think it necessary to read it at length. It is entitled, "*Act against intrusion of ministers into vacant congregations, and recommendation to presbyteries concerning settlements.*"

"The General Assembly considering from the act of Assembly August 6, 1575, *Second Book of Discipline*, chap. 3, par. 4, 6, and 8, registrate in the Assembly books, and appointed to be subscribed by all ministers, and ratified by acts of parliament, and likewise the act of Assembly 1638, December 17 and 18, and Assembly 1715, act 9th. That it is, and has been since the Reformation, the principle of this church, that no minister shall be intruded into any parish contrary to the will of the congregation, do therefore seriously recommend to all judicatories of this church, to have a due regard to the said principle in planting vacant congregations; and that all presbyteries be at pains to bring about harmony and unanimity in congregations, and to avoid every thing that may excite or encourage unreasonable exceptions in people against a worthy person that may be proposed to be their minister, in the present situation and circumstances of the church, so as none be intruded into such parishes, as they regard the glory of God, and edification of the body of Christ."

This is a very serious and solemn act of the church, not to be put aside in the easy way adopted by the pursuers. It was proposed and carried through, I believe, not by the party in the church who were most adverse to the law of patronage, but by those who were most desirous of supporting it. It embodies in a very striking form the ancient principle of the church, as it had been held at all times; and it will be seen, that the leading part of the act of 1834, which has been so slightly treated, is nearly in the very words of it.

It may be, that there were men in the church who were not very willing to give the principle full and fair effect; though I can never believe, that those who proposed and passed such an act were not sincere in that which they did with such strong solemnity. But, in point of fact, it was acted upon to a very considerable extent. The acts against simony in 1753 and 1759, shew it in the clearest manner, making it simony *equally* to become bound for money, &c. "in order to *procure the presentation*, or to the heritors or others concerned, IN ORDER TO OBTAIN A CONCURRENCE WITH THE SAID PRESENTATION," &c. But it is seen also conspicuously in the vari-

ous cases, in which the presentee was actually *rejected* on account of the unsufficiency of the call—in the cases in which the settlement was delayed on that account—and even in the very numerous cases, in which the presbyteries and synods rejected the presentee, down to a late date, though the Assembly on the merits of the call ultimately sustained it.

The case of Mercer in 1740 is but one of many cases in which the presentee was rejected. But that is a very clear case. He was rejected distinctly on the ground of *the difficulties in the call*. It *could not* be at all on any difficulty as to his translation from Aberdalgy, in the presbytery of Perth, where he was previously settled; for if that had been the objection, it must have originated in the *presbytery of Perth*, not in the presbytery of *Edinburgh*. But the case is not single. There is next the case of Manner in 1742, in which the Assembly affirmed the sentence of the presbytery refusing to proceed in the settlement, in respect of the insufficiency of the call; next the case of *Biggar*, in which, in the successive years 1751, 1752, and 1753, it was found not expedient to proceed in the settlement on the same ground; the case of Cromarty in 1752, in which “*a call to Mr. Thomas Simson, who was presented by Mr. Urquhart of Mel-drum, to be minister of Cromarty, was rejected;*” then there is the case of St. Ninians in 1768, in which the call was *rejected*; and the case of Glendovan in 1768, in which also it was rejected, though an opportunity was still given to the presentee to obtain a better call if he could. These are but examples, of what I am convinced would be found to have been much more frequently done, if the records were thoroughly searched. But it is to be observed, that a vast proportion of the cases of this kind were referred to the Commission of the Assembly; and there being no printed record of their proceedings, we only see the results where they come back to the Assembly.

The cases, in which the presbyteries and synods rejected the call, are too numerous to be particularly referred to. They continued to do so till at least so late as 1792; and *several* such cases had occurred in almost every Assembly. Sometimes, where the call was sustained by the Assembly, it was only by a very narrow majority—running even upon *one* vote or *two*—in so much that, in one case, I observe a question to have been raised by Dr. McQueen on the correctness of the clerk's state of the votes.

In addition to all this, we have the act of Assembly 1782, and the fact that, in obedience to that act, the form of the call has been in *viridi observantia* till the present day. And I apprehend it to be altogether a mistake to suppose, that it was on any *principle* against the *legality* of regarding the concurrence of the people, that the course of decisions, which ultimately brought the call into a

state of inefficiency, proceeded. The call was considered in each case upon its merits; and one decision sustained another, till at last it became difficult to say, what would be too little to satisfy the ruling majority of the Assembly. The act of 1782 shews, that they did not proceed on any such principle of illegality.

The real effect of the decisions is to shew the abuse which called for a remedy. To some extent it was admitted by those who opposed the overture of 1833, and the act of 1834. And it is evident, that, when the sacredness of decisions is alluded to,—though the weight of them cannot be so great in the General Assembly, which is a body fluctuating from year to year, and of a very popular character, as in other courts of justice,—the *legislative* powers of the church are not sufficiently attended to. It was precisely *because* of that course of decisions, that the act of Assembly was thought necessary; and, in point of fact, in the last case which occurred before the operation of that act, the case of Dreghorn, the Assembly did give the presentee the benefit of the decisions, though, if I recollect right, the call was very different from that of Mr. Young in Auchterarder. But the question of legislation is quite a separate matter, as must be apparent to every one who admits the legislative powers of the General Assembly. The act passed is partly declaratory, and partly regulating or enactive, for the instruction of presbyteries in giving effect to the principle or law declared.

After what I have said, it seems to be very little necessary to enter more into the question, what the call is. It is in vain to theorise about it. Things may be described by that name which are of a different nature; but the *fact* of the *call used in common practice*, for expressing the *concurrence* or *approval* of the people, admits of no dispute. It has been said, that there was something extraordinary in the form used by the presbytery in this case. I am convinced that this is a mistake, and must suppose that the presbytery just used the form to which they had been accustomed. But take the form from Pardovan. It no doubt is an invitation; but it clearly imports the *concurrence* of the people, and it expressly bears the *concurrence of the presbytery* also. But it is surely out of the question, after the numerous discussions on the sufficiency of the call or concurrence in particular cases, to doubt what the real nature of it is and has been for at least a century past.

The defenders have been asked to shew, where there is any mention of the call or concurrence in any act of Parliament. I humbly think, that in substance the principle of the *consent* of the people is in almost all the acts of Parliament, and very expressly in the act 1690. But the reason why it does not appear so conspicuously as other things in the civil statutes, is precisely that it is *ecclesiastical* and not *civil*—a part of the process of *admission* and *ordination*, which we are all agreed belongs exclu-

sively to the church. To make this a difficulty, therefore, is to assume, that it required a *special enactment* to legalize every one step taken in that process, which no one I believe does maintain.

I have now arrived at the end of this long deduction, and have endeavoured to explain my views of the different parts of it. Let us now draw them all together, and see what the result is.

In the *First Book of Discipline*, we have the first germ of the constitution of the Reformed Presbyterian Church. It declares the principle of the necessity of the consent of the people, and that no man be intruded contrary to it; and it gives a right of election to the people, if exercised within a limited time.

The *Second Book of Discipline* is most express in declaring the principle, that no man be intruded *against the will* or *without the consent* of the congregation—repeating it in two several articles.

That *Second Book of Discipline* was approved of in the *General Assembly* 1578, and then presented to the king, and is, long after, expressly referred to in the act of Assembly 1736.

Then the *Conference* took place, and these two articles were *expressly agreed to*—while the articles giving the right of *election* to the presbytery and excluding lay-patronage, were *not* agreed to.

After the statute 1592, the principle was again broadly declared in 1596; and the power of the church to act upon it was put into vigorous operation, in various rules laid down for the guidance of presbyteries and future Assemblies.

As soon as presbytery was restored, after the reign of episcopacy for 26 years, it was again distinctly declared by the Assembly 1638, “that there be a respect to the congregation, that no person be intruded in any office of the kirk *contrary to the will of the congregation.*”

This point is in the strongest form reserved by the Assembly 1645, in accepting the Directory of the Westminster Assembly in other respects,—shewing the clear interpretation which they put on it.

The principle is explicitly stated in the act of the estates 1649; and the act of Assembly 1649 gives a directory calculated effectually to secure it.

And it is once more announced in the most express and solemn terms in the act of Assembly 1736, long after the passing of the Act of Queen Anne.

These are all *direct* and *express* assertions of the principle in plain words. But it is with equal force and effect, that all the statutes, both of the legislature and of the church, which either express or imply the necessity of the *consent* of the *people* to the induction and ordination of a minister, bear at once on the truth of the principle, and on the power of the Church to regulate it.

And when we look at the point in this light, we have, *first*, the Two Books of Discipline, declaring in express terms the necessity

of such consent—the Assembly of 1578 necessarily declaring the same thing, by adopting the latter as the law of the Church—the Conference, in which it was *twice* repeated as an *agreed* point.

Then we have, *secondly*, the strong implication of the act 1592, ratifying the act 1567, in these two plain points; 1. That it confirmed the Church as previously established, with its whole *jurisdiction* and *discipline*; which evidently imported a ratification of that Second Book of Discipline, as the platform on which the Church stood, except those articles which had been rejected in conference, and superseded by the nature of the statutory enactments: and, 2. That it gave full authority to the Church Courts “to put order to all matters ecclesiastical,” and by ratifying the act 1581, and through it the act 1567, effectually vested every question in the *admission* of ministers in the presbytery, and made the judgment of the Assembly *final* in the matter.

Thirdly, The *particular* provisions of the act of Assembly 1596, in regard to the *fitness* of the person for the particular place, plainly prove, that, according to the understood construction of these statutes, the Church courts were the sole judges of that matter, and that all questions of the kind, whether on the literary and moral qualifications of the presentee, or on any other ground, must *take end* in the General Assembly.

The act of Assembly 1638, confirming the rules of 1596, still farther shews the *necessity of the consent*; being *very express* in its words to that effect.

Fifthly, The act of 1645, ratifying the Westminster Directory, vindicates very emphatically the right of the *people* as previously maintained.

Then *sixthly*, the act of Assembly 1649 placed the necessity of the consent of the body of the congregation, even where the Kirk-session nominated, on the footing of a negative of the majority being conclusive, unless causeless prejudice was positively proved against them.

Seventhly, the act 1690, 23. expressly recognised the principle, even where the heritors and elders were patrons, that the *approbation* of the people must be asked, and by necessary implication reasonably obtained.

Then, *eighthly*, by the practice under that act, previous to 1712, it is abundantly clear, that the matter was in general carried much farther than that principle of the statute, and that, in very many cases, the *right of election* and *presentation* by the heritors and elders was laid aside, and a direct *calling* by them and the heads of families substituted.

Next comes the remarkable practice after the statute of Queen Anne, evincing beyond all controversy the principle of the church

at least, and the strong sense of the country, that it was deeply settled in the belief and feelings of the nation.

Then the act of Assembly 1736 rivets it by express *declaration*, repeated in the face of all the land.

The acts against simony, and even the act of 1748, again authoritatively recognise it.

The uniform practice of requiring the *consent, concurrence, or call* of the people, in order to warrant induction on any presentation, goes on continually:—Many are positively rejected for want of it,—still many more are rejected by the presbyteries and synods; and in another numerous class, the parishioners dissenting try their fortune by appeal against the judgments of the inferior judicatories, on the ground of their having granted induction against what they state to be, inclinations of the body of the congregation. In all that time, no one dreams of making the question of refusal to proceed, on the ground of the insufficiency of the call, the subject of any legal proceeding.

In 1782, there is the *unanimous* declaration of the Assembly, that the moderation of the call is according to the “*immemorial practice*” of the church. In 1790, a presbytery is *censured* for having presumed to proceed without it. And, finally, that requisite, in the very solemn terms which have been quoted, has continued to be *invariable* down to the day of the meeting of the presbytery of Auchterarder, when the presentation in this case was sustained, *and the day for moderating in the call was appointed*.

And while these points, fixing the principle of the *call* or *concurrence* of the people has been from time *immemorial*, and till this hour, a known and universally admitted element, essential in the process of induction, and fixing also the origin and ground of it, “that no man shall be intruded,” &c., is it not also now fully ascertained, that the Established Church of Scotland, by the sessions, presbyteries, synods, and General Assemblies, as authoritatively recognised, not merely by single special statutes, but by *the statutes on which the monarchy of these kingdoms rests*, has the most ample powers to administer justice, and to pass laws, in all matters ecclesiastical, and the clearest exclusive jurisdiction in the admission, trial, ordination, and induction of all ministers, by whatsoever title of presentation they may appear before them?

Such is the state of the law and history of this matter in the Church of Scotland, as I have learned them. And such is the Church of Scotland itself, by its constitution, and its existing condition in the state.

3. These views prepare us for considering the *third* question which I mentioned in the beginning,—viz., Whether the fact of the presbytery, in the process of moderating in the call, having

taken notice of the dissents of the majority of the male heads of families, being communicants, and having, on the ground of those dissents, rejected the presentee, (supposing that this were competently libelled), renders such rejection *illegal*, and gives jurisdiction to this Court to declare it to be so.

It appears to me that a very great fallacy has crept into the reasoning on this point. The real question is, whether *what was done* by the presbytery was *illegal*. What might be the *ground* or *cause* of their doing it, is wholly foreign to any *legal* question which we can consider. Assuredly, the pursuers are not entitled to treat the matter otherwise, having laid their case distinctly upon this footing in the summons. But, at any rate, I conceive it to be a point which will admit of no doubt whatever, that if the *presbytery* had power, acting in their proper sphere in the process of the admission of a minister, and particularly in the moderation of the call, to do the thing which alone the summons says *they did* in this case, in the same way as they might have done it, in the case of Mercer, St. Ninian's, or any of the other cases, it must be perfectly clear, that it is purely an ecclesiastical matter, and that the General Assembly, proceeding according to their own rules, had power to pass an act of Assembly for the *instruction* of the *presbyteries* in that part of their ecclesiastical duty.

The question, therefore, never can be any thing else in this Court, but whether the act of the *presbytery* was *ultra vires* of them, as being in violation of civil rights, and on that ground cognizable in this Court.

The previous course of the decisions of the General Assembly on the nature and effect of the call in particular cases is, in my opinion, altogether irrelevant, when founded on in support of the pursuers' plea. Or rather, I should say, that to refer to it in reality shuts the door of this Court against any discussion on the subject. I understand, indeed, that at least some of your Lordships, from whom I have the misfortune to differ, hold decidedly, that the question as to the amount of concurrence required always did belong to the church courts. The decisions just prove that it is a *matter ecclesiastical*. The question, whether any General Assembly would have held it competent, just, or expedient, to depart from that course of decisions, in a particular case, without first making a declaratory and regulating act, is *manifestly an ecclesiastical question also*. For it is new to me that, where any court of independent jurisdiction has in its own proper sphere pronounced certain judgments, the effect of such decisions, as precedents for any particular case, *can* come under the cognizance of *any other court*, except a court to whose review their sentences are exposed; or that any such point can form an element for consideration, in the attempt to try a case of that nature in another court having no such power of

review. If the presbytery were bound to follow the precedents, it was only by their allegiance and subordination to the General Assembly ; and if they thought that the precedents did not apply, or ought not to decide the case, no *other* power could correct their judgment in that point but the General Assembly itself.

But it must be obvious, that the very reason for passing any act of Assembly was precisely, because these decisions would have rendered it difficult and might have presented an appearance of injustice, if, in trying the merits of the call in a particular case, a different principle had been acted on. But is it a new thing in jurisdiction, that it may not be thought expedient to depart from a *series rerum judicatarum*, and yet the court, if it has power, or the proper *legislative body*, may declare, that in future the courts shall be guided by different rules, held to be more consonant to the true principles of the law. Even *this Court* has often done so. Nay, you have not hesitated, when you thought justice required it, to depart from *long trains of decisions*, and at once to decide the very *reverse* of them in particular cases. The House of Lords, and, I believe, all the English Courts, have often done the same.

But the General Assembly is a body of quite another character from any court which has merely the powers of a court of justice. It not only can decide judicially the cases which come before it, but it has power to *pass laws*, from time to time, on all the subjects which belong to *its own jurisdiction* and *that of the presbyteries* ; and to deny this is, with submission, to remove one of the essential foundations of the constitution. If they should depart from the principle of decisions, simply, other men may think they do wrong ; although the judgments of single Assemblies in particular cases never can be of the same weight as decisions in other courts of judicature. But whatever they do *in the matter*, whether by judgment, or by the effect of declaratory and regulating acts *de futuro*, *the matter itself* must retain the same character of an *ecclesiastical question*, which it had the *first day* that the same question was presented to the Assembly for judgment.

But return to the point as it is stated in the summons ; and take it, that the thing *done by the presbytery*, and here complained of, was simply *their act*. Take it, that the same thing had been done before the act 1834. Is there any *illegality* in it which can bring it under the review of this Court ?

I assume, that the power of *admission, collation, and ordination*, and the entire power of judging of all questions of qualification and fitness, belong exclusively to the church courts. They are called to the solemn duty of ordaining a man to be a minister of the gospel in the Church of Scotland—to form the pastoral relation between him and the people of the parish—and to invest him with

the sacred character, by which, before God and man, he may administer the sacraments, and in all things discharge the duties of a faithful minister *among that people* ; and those of your Lordships who may have witnessed that ceremony will know, that it is no *civil* process, but a *religious solemnity* of the most impressive character.

I assume, also, that the moderation of a call by the people, following the sustaining the presentation, is according to the *immemorial* and *constitutional* practice of the church. And if this is a *reality*, or ought to be so, then it is the *duty*, but at any rate it is the *right*, and within the *power* of the presbytery, to consider whether there is a *sufficient concurrence*—whether there is such a concurrence, as to indicate that the settlement is with a *reasonable consent* of the people. If they find it to be clearly otherwise, that there is in fact no concurrence, but on the contrary, the strongest possible state of dissent, it becomes most manifestly a case of *intrusion*, contrary to the law of the church ; and it is then their right and their duty to reject the presentee, as being *insufficient*—*unfit*—*unqualified*, for being a useful minister in that parish.

But, while it is by some at least admitted, that the church courts can alone judge of the sufficiency of the concurrence, it is said, that the proceeding here is illegal, because it proceeded on a *veto* by the parishioners. *Veto* is a mere word, and does not alter the nature of the thing. Lord Fullerton clearly shewed, that the *absence* of *concurrence*, on which so many presentees were formerly rejected, is just as much a *veto* as a *majority of dissentients* can be. In fact, it is a much more rigorous veto. Many men will not formally *concur* in the call of a particular man, who would by no means enter a *positive dissent*, or take the solemn declaration which may be required of them. The presentee, therefore, has the advantage, by the rule on which the presbytery acted, of having *silence* construed into *concurrence*, and all held to *concur* who do *not dissent*.

But there is an assumption of some *novelty* in this, which has no foundation. In considering the question as to the sufficiency of the call, the church courts did *always* take into view the number of *dissentients* who objected to it. There were generally many of them appearing at the bar ; and there never was such a case tried, in which long lists of the dissentients were not laid before the presbytery and the Assembly. It was so in the very last case of the kind which has occurred, previous to the operation of the act of Assembly, that of *Dreghorn*.

Now, if the presbytery had a right to consider the state of the call, it was assuredly within their province to consider the dissents in relation to it. It was an ordinary part of the proceeding in

moderating in the call, and is not at all altered by the fact, that they may have had an instruction on the subject by the General Assembly, which might disembarass them from the effect of the decisions of former Assemblies in particular cases. And is it not obvious, that, when this was the duty they were so engaged in, it is no answer, in the point of legality, to say, that this interferes with the exercise of the right of patronage? That argument assumes incorrectly, that the right of patronage is absolute, and not a limited trust, subject to the conditions belonging to it. The exclusive right of the church courts to judge of the presentee's *qualifications*, even as the pursuers unwarrantably would circumscribe that right, equally limits it. But if the premises I have endeavoured to fix are right, this necessity of a call being moderated, and of the existence of the consent being found by the presbytery, is as much a *condition* as in the other case, which has at all times attached to the rights of patronage, and which, if it cannot be satisfied, renders the presentee *unfit for that parish*, though the validity of the presentation itself is not disputed. And of this matter the presbytery, equally by the civil statutes, and by the laws of the church, are the sole judges.

I have already shewn, that, in this case, the process of the *moderation of the call* was not otherwise completed, except by the *rejection* of the presentee, which was the completion of it. But if you are to set that aside, the process must of necessity be resumed, where it stood before that judgment was pronounced, or before the dissents were received. Those of your Lordships who think, that, after the moderation of the call has existed for ages, this Court can, by its own authority, abolish it, though wholly an ecclesiastical proceeding, may see no difficulty in this point: But you will have to consider well, whether you can do so, upon a summons and record, which do not raise that question at all. Those of your Lordships, however, whom I understand still to hold that the moderation of the call cannot be dispensed with, must, I humbly submit, see very great difficulty in dealing with that which is *so plainly ecclesiastical matter*, and which ever was judged of by the church-courts exclusively; and still greater, in either deciding any thing which may indirectly supersede it, or giving any judgment in relation to it on the summons in this action.

With these views before us, I would turn back for a few minutes to the proper question of *jurisdiction*. The idea of *collision* between two such jurisdictions as that of the General Assemblies and Presbyteries of the church, and this Court, is of the most serious and alarming nature. If it has arisen, there is no help for it. But the question is, whether it has arisen or not. If what has been done by the Presbytery of Auchterarder is of the nature which I have

taken it to be, it cannot be changed by a name, or by saying, that it is interposing something between the sustaining of the presentation and the trial of the presentee. The *moderation of the call* must be, and always is, so interposed. Nor can it be altered by saying, that the taking of dissents assumes part of the right of appointment. If the members of the *congregation* are called on to give their *consent* or *concurrence*, they *must* judge whether they will do so or not; and so the moderation of the call always implies such an assumption, if there were any correctness in the idea. But it is truly a fallacy. The effect of dissents, or of the want of concurrence, is but *negative*; and surely every one knows the practical difference between the *power of selection*, and a *negative power of objecting*. All experience proves, that it never does lead to the inference so hastily drawn from it. It never did in other cases. The experience under this act, even in the first years of its operation, has falsified it even in the very few instances, in which the first presentee of the patron has been rejected; There is not *one* instance of the dissentients holding out for any particular individual. Equally irrelevant and inconclusive is it to say, that it is *delegating* the power of judging of the presentee's qualifications to another. This is again impeaching the moderation of the call. But it is irrelevant otherwise. No law of the state hinders the presbytery from taking what assistance they please from others, in forming their judgment of the presentee's fitness for the parish. *They* are the sole judges of that matter. They take such aid, when they accept of the license, and require it as indispensable. They are compelled to do so, by *the laws of the church alone*, when they yield to the resolution of another presbytery not to loose a minister already in a parochial charge.

Although, therefore, forms of speech may be used, which tend to disguise it, to my mind it is apparent, that we are at present simply required to consider the *common case of a call rejected by a presbytery* for insufficiency. If there is any difference in the actual case, it is a difference *against* the pursuers, that the presbytery have acted in conformity to the instructions of a standing law of the church. No such proceeding ever was attempted in any of the numerous cases of the same kind, which have been discussed and disposed of in the church-courts, in the course of a century now elapsed.

But, in the cases now before the Court, you have not only the proceedings of an independent court of justice, from which, in its own department, no appeal lies to your Lordships; but the act of an independent legislative body, declaring the law in a matter *expressly committed to it by all the statutes*, the qualification, induction, collation, and ordination of ministers. It is easy to put extreme cases, and to suppose, what I never heard maintained, that the Assembly should assume the power of acting and judging in

matters plainly of *civil* right, and defend their proceeding on the mere ground that it was *done in the General Assembly*. There is no such case here. I am persuaded there never will be such a case. No such thing has been said in this cause, that I am aware of. The Assembly and the Presbytery were here acting and judging in that in which they have judged, and passed laws, for ages bygone—the *admission* of ministers into that church, all whose ecclesiastical interests are committed to them; and, until it shall be determined, that the *ordination of a minister* to preach the gospel and administer the sacraments, is an act of *civil* jurisdiction, I must continue in the belief, with all possible deference, that such extreme cases have no bearing on the question, and that both the Presbytery and the Assembly were strictly within their ecclesiastical functions, in all that even in argument they are alleged to have done.

An illustration has been drawn from the jurisdiction assumed by the Court of Queen's Bench in cases of libel, defended on the ground that the party acted under the protection of the privilege of Parliament. To my mind, there is no analogy between that case and the present. A civil wrong is alleged to have been done by an individual subject, *not in Parliament*, but before the public. He merely defends himself by saying that he acted by orders, and that the House of Commons or Lords hold that they have a certain privilege. Must not the Court, in trying such a case, inquire whether there is such a privilege? But here is the *judicial* proceeding of an independent court *in its own duty*; and all you can say is, that they have *adjudged wrong*, and that, *consequently*, as in many other cases which it is admitted this Court could not touch, a party suffers, *not a wrong* which you cannot assume and cannot competently judge of, but a *loss*, which is the necessary result of the adjudication of the competent court. If it were admitted to be matter of *qualification*, I suppose no one would apply the illustration. Yet the point of jurisdiction is really the same.

I know nothing of the rules which would govern such cases in England. But I do know, that there are great and essential differences in the constitution of the two Churches, and in the powers of the courts of law, arising from the positive statutes which affect them,—and from the principle, that the King is the Head of the Church of England, not simply as claiming the subjection of all men to him as the sovereign and chief magistrate under the laws, but as *spiritually the Head of the Church*, and forming a *component part* of it; whereby it may be, that many things are competent to be brought into the Queen's Court there, which never could be attempted to be brought into this Court. Yet, professing to have no knowledge on this subject, I do believe that we cannot have any correct understanding of it.

I have had in my mind many illustrations of the question of jurisdiction. I shall now mention only one, as the subject of it was already alluded to by your Lordship. I am aware of the discussion which took place in the General Assembly, on the subject of the union of *professorships* with *pastoral charges* in the town parishes. But, long before that discussion, the act of the General Assembly in regard to such *pluralities* where the parishes were at a certain distance in the country, had been *moved*, carried, and transmitted to presbyteries in 1816, and ultimately *passed into a standing law*, by Principal Hill, in 1817. He, at least, was not a person likely to stretch the power of the Church in such a point. Yet the *law* so passed by *him* has now been in indisputed force for twenty-one years.

My Lord, I draw near to a close. But I must advert to the decisions quoted. If there be any one thing clear in this cause, I think it is clear, that the pursuers have entirely failed to produce a single case, which gives the least sanction to the plea of *jurisdiction* here maintained by them.

The *first* is the case of *Auchtermuchty*. Mr. Moncreiff was *presented*. The presbytery *de plano* rejected the *presentation* altogether. They did not *receive* it, and then appoint the moderation of a call to the *person* presented; but at once *rejected the presentation* itself, and appointed a *call at large*, i. e. an *election*. The presbytery did this, while the *six months* from the vacancy were *still running*. And, on the moderation of a call at large, a call being given to *Maxton*, he was *tried, ordained, and inducted*.

Mr. Moncreiff had appealed to the *synod*, who *reversed* the proceedings of the presbytery, and very improperly ordered him to be *ordained* in the face of an *appeal* to the Assembly. This was reversed and recalled by the Assembly. In the meantime, Mr. Moncreiff had applied to this Court, and got, not an interdict, as Lord Mackenzie supposes, but a mere *sist* on a bill of advocation, in itself found, as it plainly was, to be incompetent. Notwithstanding that *Maxton* was *settled*; and there were proceedings in consequence.

Hence the question arose, in a different form of process, not as to *Maxton's* right as *minister of the parish quoad spiritualia*, and not on any attempt by *Moncreiff* to *make himself* the minister: No such question was for a moment thought of. The patron merely claimed a right to retain the stipend; and the *presbytery* was *not a party*: No attempt was made to try the question of stipend with the presbytery.

It is manifest, that this is no authority for the present case. It was a mere question on the *civil right*. This appears clearly, because, (1.) There was a discussion as to the validity of the presentation; (2.) The presentation had been entirely rejected at first,

and a call at large ordered while the six months were running; (3.) Then the conclusions of the summons were for *the stipend only*, and *not* against the *Presbytery*; and, (4.) Nothing else was done but the giving judgment on this point.

It was very natural, that Maxton should plead on the want of concurrence, and on the effect of the ordination, in order to try to bring the case to that point. He had nothing else to say, *if the presentation was good*. But the case was that of a distinct refusal by the presbytery to act at all on the presentation, and so it opened precisely the right to retain the stipend.

The next case is that of *Dunse*, which I think a very clear case for the defenders. The patron had presented. The presbytery assuming that it was too late, presented *jure devoluto*. The Court entertained only the questions as to the validity of the presentation, and whether the patron had presented in time, or the *jus devolutum* had fallen. But in attempting to raise the last plea, there was an express conclusion on the point, very different from the summons in this case.

The Court expressly refused, 1. To declare *anything against the presbytery as to stipend*; and, 2. To meddle with the conclusion to discharge the presbytery from settling another man. For Lord Monboddo says in his Report, "There were two conclusions in the summons which the Lords did not meddle with. The one was, that the stipend did belong to the patron till the presentee was settled. This the Lords did not think competent to be declared against the Presbytery, who never could have any right to the stipend. The other was, that the presbytery ought to be discharged to moderate a call at large, or settle any other man, because this was interfering with the power of ordination, and the internal policy of the church, with which the Lords thought they had nothing to do." But, in attempting to raise the plea, there was an express conclusion on the point, very different from the summons in this case.

I do not well understand what is meant, when it is said, that this is only the statement of Lord Monboddo, and that it is not in Falconer's Report. It is just Lord Monboddo's Report of the case; and I know not why faith shall not be given to it, as well as to any other report by a person of eminence in the law. There is nothing in Falconer's Report to contradict it; only he does not mention positively that the Court declined to meddle with these points. The conclusions of the summons, and the only thing done, shew that Monboddo must be right. But I own I was much surprised at the objection; for I always heard, in my younger days, from the older lawyers on this bench, that Falconer was the very worst of our reporters. Why Monboddo, a judge, and a very eminent man, when

he supplied his defects, should be rejected, any more than Elchies or any other, I know not.

Even the judgment itself was *reversed*, because the *presbytery* was held not to be the proper party, and the precise point of the *jurisdiction* was expressly reserved in the judgment of the House of Lords. How can you in the present case *sustain the jurisdiction* against the *presbytery*, not in any question about the *presentation*, for no such question exists, but in the clear process of *admission* belonging to the church alone, and with no conclusion as to the *jus devolutum*, and no record about it? That case seems to me to be a clear authority for the precise point, that you cannot try the question even of *the stipend with the presbytery*.

The next case mentioned is that of *Culross*. It was a case of *disputed patronage*; for the town of Culross claimed a right of *election*. A person different from the presentee was settled by the *presbytery*, in the face of an appeal to the *Assembly*. But the Court merely found the patron entitled to retain the stipend.

The fourth case is that of *Lanark*. Here there were *disputed presentations*. Dr. Dick was settled; but it turned out, that he was so by the *wrong presentation*. The question raised was about the *stipend* only. It was very much doubted. The Court decided *against the jurisdiction*, and for Dr. Dick.

That case is evidently no authority for the present. There was no attempt to *interfere* with the proper powers of the church; and in fact the right to the church, the manse, and the glebe, were afterwards determined in favour of Dr. Dick, who possessed them till he came to Edinburgh.

These two cases just determined *with difficulty*, that, if the *presbytery* mistake where the right is, the party found to be patron may retain the stipend, though another than the presentee becomes the minister. They give no right whatever to the presentee, and are quite the reverse of holding, that, where a presentation is *sustained*, this Court can interfere with the ecclesiastical proceedings of the church in the ecclesiastical duty of *induction*.

In the case of *Kiltarlity*, the question was, Whether a presentation was good or not. The action was merely found competent as to that. There was no party with a title disputing it; and so the Court found. But it was an attempt to *impugn* the judgment of the *presbytery* sustaining the presentation, on a ground clearly civil.

The cases upon the *jus devolutum* all turn on questions of civil right. That of Lord Dundas was clearly so; the question being expressly raised by the summons, whether the *jus devolutum* had fallen or not. But it is to be observed, that, though the summons in that case contained other matter, the Court again refused to meddle with any thing but the question, whether the patron had

presented in due time, or the *jus devolutum* had fallen. No such question is here raised in any competent form. The six months were still running at the date of the action. There is no conclusion to attempt to try the question as to the ultimate result, if the patron should not present in time ; and the presbytery have done nothing. It seems to be quite incompetent to change the case by the lapse of time since the action was raised.

I have now delivered my humble judgment :—

1. That the summons, as it is libelled, is incompetent in its form, and nugatory as leading to no result against this presbytery, and altogether involved in ecclesiastical matter alone, with which this Court cannot competently deal.

2. That the summons, defences, and record together, raise no question in a competent form, relative to the act of Assembly 1834, —the *moderation of the call*, or the *jus devolutum*. I am not unaware, as I before stated, that, in the answers for the defenders, they have stated *narrative*, that the presbytery acted in obedience to an act of Assembly. Their counsel perhaps necessarily did so. But their *defence* is on the *want of jurisdiction* simply, in regard to the *act of the presbytery* in rejecting the presentee in respect of what is called a veto of the parishioners, as alleged in the *summons and condescendence*. And I find no plea in law for the pursuers, which goes beyond that point, or which at all touches the *legality or illegality* of any act of the General Assembly. That there is no record on the *moderation of the call* as illegal, and no question raised as to the *jus devolutum*, is apparent ; And I would just appeal to your Lordships, whether, for the discussion of any of these questions, as they have been argued, we had not a right to expect a very different summons and record from the *pursuers*, who profess that they meant to try them, from those which they have presented to us.

3. I have stated the grounds, on which I am humbly of opinion, that, so far as the question is before us, the presbytery were acting entirely within the powers vested in them by law in all that they have done,—that they have dealt with nothing which is not strictly *ecclesiastical*,—and that, in so doing, however incompetent I may think the inquiry, they have acted in conformity to all the laws and principles of their own constitution.

And, finally, 4. I have explained the reasons for which I think, that, even though we had a proper summons and record, this Court has no jurisdiction to try any one of the questions attempted to be raised in this cause.

I am happy now to relieve your Lordships from the pain and inconvenience of listening to so tedious an exposition of my opinion on this case. Something has been said of the possible consequences

of any judgment which your Lordships may pronounce, On that subject I shall not say a word, and certainly will not even imagine what opinion I should have, on an action of damages against the General Assembly, and all the presbyteries of the church, or even against this presbytery.

Only permit me to say in conclusion, that, as I have expressed my opinion, and hitherto acted upon it to the utmost of my humble ability, for preserving the rights of patronage, though within the limits which I think attach to them by law,—and entirely repudiating the idea of any thing like *ambages* in that matter,—I earnestly trust, that it may not in the end be found, that they who so consulted for the patrons and the people together had not taken the least considerate view of the real interests of both.

My Lord—I have done.

Tuesday, March 6.

THE LORD PRESIDENT.—“ LORD GLENLEE.”

LORD GLENLEE.—My Lord President, I understand the fundamental question to be decided is, whether this act of the Assembly 1834 was within their competency. The pursuer says the presbytery acted illegally in proceeding in the manner in which they did; and the defence of the presbytery is, that they acted entirely in conformity with the laws of the church, and in particular with this act of 1834. And certainly, if it were within the competency of the Assembly to pass that act, the defence must be sustained. But on the other hand, if it does appear, upon due consideration, that, really and truly, the act of Assembly 1834 was in itself *ultra vires*, and consequently an illegal act, on the part of the Assembly, it will not justify the conduct of the presbytery;—for although they may indeed escape all sort of moral blame or censure, because they obeyed the instructions of their ecclesiastical superiors, yet still their act must be held as, in itself, illegal.

The ground, upon which the pursuer seems to proceed, is this:—He says, that this act was beyond the competency of the church; and, that somehow or other, it is in violation of his rights of patronage. To be sure, if he can condescend upon some specific civil right, which he can satisfy your Lordships has been disappointed by this act of Assembly, it may be true that he is entitled to have the act declared *ultra vires* and illegal, and to obtain redress in this court.

But really, I suspect, that, in this matter, a good deal must depend upon what our ideas of the rights of the patron are. The pursuer has formally pleaded a right of which I have very great doubts. He seems to think, that truly, and fundamentally, a right belongs to the patron to nominate unconditionally, a person who shall be the minister. I have no idea that the right is of this nature. He has only the right of presenting a person who may be inducted, if the superior churchman to whom he is presented has himself a full and complete power of inducting him into the benefice. To be sure, in the case of the superior churchman having this power, the right of presentation would, in fact, be a right of nomination.

As to the origin of patronage, I shall not say anything ; but, certainly, it was introduced after churches were fully established. These were filled up, some way or other, by bishops, or other functionaries of the church at the time. It is exceedingly probable, that, originally, this functionary was liable to some restriction in the capacity which he thus had of introducing a person to the cure of a particular congregation. I have not a doubt on that head, though I certainly have no idea, that, at any period whatever, the right of electing their ministers was vested in the hands of the Christian people. On the other hand, it is equally clear, that, in the beginning, their consent, in some shape or other, was supposed to be necessary for the canonical filling up of the benefice ; for I see that various complaints were made, that one party had transgressed by invading the rights of the other ; and particularly on the part of the congregation, that persons had been intruded on them. Thus it appears that the *clerus* and *populus* had each a part assigned. But, in all human probability, the popular consent was, in reality, nothing else than a tumultuary expression of good-will by the people. In the progress of time, it is likely that this consent came ultimately to be neglected ; and that either the bishop, or some other functionary in whom the right was determined to reside, had the absolute power of putting in a person to the charge. In that state of matters, perhaps the patron had a direct right to compel that functionary to induct the person whom he had chosen. It is very possible that, in such a situation, the patron, if his presentee were refused, might be authorized to compel him to give effect to his presentation.

Now, whatever may be the case in countries where this right of appointment is not dependent on any assent by the people, it appears to me, from the very nature of the thing, that the case must be altogether different in a country, such as ours, where the church, itself, has no power of putting a minister into a benefice against the will of the congregation. This circumstance convinces me, and has always ruled me very much in the matter. I think I may take it for granted, that here no person can be intruded on a congregation contrary to the will of the congregation. There are acts of the church, one of an earlier, another of a later date, which declare that this principle is a fundamental law of the Church of Scotland.

Now, many material points might be indicated in the different statutes which have been quoted and referred to, in connexion with the present case. But the most material of those acts appeared to me to be that of 1567, c. 7, which begins with declaring, “ That the examination and admission of ministers within this realme be only in the power of the church ;” whilst it enacts that “ The presentation of church patronages always is reserved to the just and ancient patrones.”

It appears to me that these words do not reserve the right of pa-

tronage generally, but that, in this particular matter of the admission and qualifications of ministers, the act simply reserves to the patron the right of presentation; and then goes on to point out how that is to be effectuated; ultimately declaring, in precise and positive terms, that an appeal may be brought to the General Assembly, and that their judgment shall end the cause. This seems to me to reduce the right of the patron in this particular matter—I mean in the admission of ministers; for it is only this particular matter of the admission of ministers to which the act refers,—to a right of presentation. And indeed patronage has always existed, though it is commonly said that patronage was abolished at one time, and restored at another. It was not so abolished, but the right of presentation was only given to different parties. But my idea is, that it was the *enixa voluntas* of the legislature, by this act, in reference to this particular matter of the admission of ministers to which it refers, to confine the right of patrons to a mere right of presentation: And, in pointing out the course to be taken by them in order to effectuate this right, it declares, that the cause may be appealed to the Assembly, where it must take end by the judgment of that court.

A material part of the same act is, that it declares the examination and admission of ministers shall be in the church alone—that is, in the inferior courts first, and in the General Assembly in the last instance. There never occurs, either in this statute, or in any other, any definition on the part of the legislature, of the qualifications of which the Assembly was to judge. I fairly own that I see no reason for confining their power to that of judging of qualifications merely moral and literary. I think the act necessarily implies that they shall judge of the presentee's qualification for filling that particular charge to which he is designated. How could they act otherwise? The church was prohibited, by its own laws, from giving admission to any one as minister of a parish where he was not acceptable: They must, therefore, be satisfied, some way or other, that the will of the people is not against him. The general expression which is used in reference to the law on this matter is of extreme vagueness. What particular will, or amount of consent, is spoken of, is more than I can well say; and, therefore, I think, that the fixing of the particular rule for judging of this matter is, of necessity, devolved on the Assembly.

There is another act—that of 1592, c. 116—quoted and founded on by the pursuer, which ordains all presentations to benefices to be directed to the particular presbytery, with full power to give collation thereon, “provided they shall be bound and astricted to receive” and admit quhatsumever qualified minister presented” by the patron.

I know it is said—(I am not very fond of that mode of arguing)

—that this referred only to ordained ministers ; and if it were so, I think the construction would be strongly in favour of the right of the church to determine—as one of the necessary qualifications for the particular charge—whether he was acceptable to the people—yea or nay. For if he be already a minister, with the spiritual and literary qualifications, and those of a good life and conversation, there is no other earthly qualification upon which the presbytery could possibly have to decide, as they are required, except the qualification of his acceptableness to a majority of the congregation. However, I think this too nice a construction of the words of the act, and I am really of opinion, from what I see in the other acts, that the fair meaning of the expression “a qualified minister” is, a person qualified to be a minister ; and nothing else.

Another argument which has been founded on is, that the presbyteries are, under this statute, (and there is no express difference between its terms and those of the act 1711,) “bound and astricted” to give induction where a qualified person is presented ; and that it is sufficient that a qualified person be offered to a presbytery. To me, however, it appears, that the true meaning of the statutory restriction is—not that the presbytery were bound to induct the person presented to them, at all events ; but only, that they should not, on any consideration, (which I suspect they sometimes took the liberty of doing,) induct any other person, or order a call in general, so as to choose a party different from the one prescribed by the patron, or in any way to act as if the disposal of the benefices were in their own hands. Sometimes we see, from the reported cases, that such proceedings took place—that the presbyteries and General Assembly, some way or other, inducted a person different from the person who was presented,—a proceeding contrary to law, as established by the judgments in these cases.

Therefore upon the whole I do think, if it be granted that no person can be brought into a parish against the will of the people, that the proper judgment, whether or not he has the will of the people in his favour, belongs to the presbytery : I think it was the *enixa voluntas* of the legislature that it should be so ; and I think it was wise to put this matter in the hands of the presbytery alone. But if it were in the power of the presbytery to judge in any particular case, whether the person presented had properly a majority in his favour, I fairly own that I cannot, for my life, doubt the power of the church to make a general order or appointment, that the course of judgment they may prescribe should be henceforward in all cases followed.

Suppose, for instance, the admission of a minister came to be contested, as has happened very frequently in the Assembly, on the question whether or not there was a sufficient call,—and suppose the presbytery had pronounced an explicit judgment, finding that the

majority of the congregation dissented from the call, and, therefore, refusing to sustain the call, and so the case went through all the steps, and the presentee was rejected,—Could the parties interested in the presentation come to this Court for a remedy, pleading, “ This judgment of the presbytery is not only beyond their powers, “ but contrary to my civil rights as patron.” And why is it so? “ Because they have taken upon them without sufficient inquiry “ into the grounds and nature of the dissents, to hold a mere dis- “ sent a sufficient reason for rejecting the presentation.” Could such a case come before this Court? or was the judgment of the presbytery one which could be challenged here on the ground taken in the present complaint, that the church has presumed to give a veto to the heads of families without putting a single question as to the grounds of dissent? If such a judgment could not be altered in this court, how could the General Assembly be hindered from laying down that rule prospectively?

Really I see no just foundation for this action. When the pursuer comes to shew the particular right violated, I find nothing else than that his presentation is not sustained. Why, that is the very thing to which, by the act 1567, he was expressly precluded from objecting. He had no title to say he had any right whatever, except to have his presentation tried in the presbytery and Assembly, in the manner in which the statutes direct.

The act of Assembly in question is said to give a *veto*, and has been styled the *veto* act. Really it is not right to give nicknames in that way. Let us, however, see what the thing is. What is it? A simple declaration that the dissents of the majority of heads of families should be held as *probatio probata*, that the man is not acceptable to the parish. I cannot think the objection of the pursuers is well founded, merely because they choose to call it a *veto*.

We are told the presbytery have no right to delegate their office, and that under the act 1834 they delegated their office in this case to the congregation, when they ought to have used their own judgment. What is it but an inquiry into the acceptableness of the presentee? They are taking the best evidence—what they think the best evidence—on this point. Does a judge, or do a court, delegate their power to a witness, when they examine him?

Upon the whole matter, it may be that this act is an improper act; but for the life of me I cannot find myself at liberty to say that the act is *ultra vires*. I think the Assembly had power to pass this act, whatever I may think of their right to pass acts of a different kind. The Assembly agreed to the appointment of a committee to draw up rules and regulations, on the footing that the dissent of the congregation was a disqualification; and I think they were entitled to do so.

I have said nothing with regard to Calls, for this would involve us in a long history ; and every thing that can be said on this subject has probably been said already. I shall only observe that, from the general form of the Call—whatever it may have been—I take it, of late years, it has been used only as a token of consent. If nobody dissented, it was held as good evidence that the man was agreeable.

The only other thing I have to say is, that, it appears to me, that the ordinary form of a presentation implies, that the presbytery was to judge not only of the qualification of the presentee as to his literary and moral character, but also especially of his being qualified for the identical parish. For these forms of presentation, after requiring the presbytery to consider such and such qualifications of the presentee, as, for example, his literature and good life, always end with a request, that the presbytery, having found him qualified for the identical parish, should proceed with his induction accordingly.

The pursuer, Mr. Young, has been found wanting in the qualities which fit him for the parish in question, by reason of a large part of the congregation dissenting ; and on the whole, therefore, I am in favour of the defenders.

I am certainly much afraid, that many evils will result from the present state of the ecclesiastical law, which, I daresay, were not in the view of those who passed the act 1834. But whatever may be my views on this question, I am of opinion that the presbytery acted according to the rules of the church ; and that the act of Assembly 1834 ought to stand as their sufficient warrant.

Tuesday, March 6.

THE LORD PRESIDENT.—“LORD JEFFREY.”

LORD JEFFREY.—My Lord President, I concur generally in the conclusions at which the three judges who have spoken last have arrived; and I adopt, for the most part, the grounds on which they have rested those conclusions.

I understand that there is nothing now before us but the Declaratory conclusions of the summons; or rather such of these conclusions as can be competently insisted in against the presbytery of Auchterarder, the only compearing defenders; and I agree entirely with Lord Fullerton and Lord Moncreiff in thinking, that the pursuers can be allowed to derive no aid, in determining the true character of these conclusions, from their having formerly insisted on others, which they have chosen for the present to withdraw. When I look to the very grave objections raised to their title to proceed with those other petitory conclusions, I am satisfied, that we never can discuss the declaratory process, now alone before us, on any such assumption as is usually made when a question of relevancy is discussed, before answer as to facts that are averred. The course of proceeding in such a case is, that the party objecting to the relevancy says, “*assuming* your facts to be true, they do not support your conclusion;” and they are accordingly assumed to be true, when the relevancy is discussed. But here the objections to the title of both pursuers to insist in the petitory conclusions, for stipend &c., were, “you, the presentee, never can have any right to stipend, as due under the presentation, till you have obtained *induction* to the office; and you, the patron, never can have any right to it, as vacant, till you can get rid of the statutory title of the Widows’ Fund.” Instead of proceeding to meet these objections, they voluntarily *withdraw* the petitory conclusions to which they applied; and now demand judgment in the declarator alone. I can interpret this conduct only in one way; and I hold the import of it to be, that they allow the defenders in the mean time to assume the validity of these objections, and substantially say, “*assume* that we have no right at present to demand payment of stipend; we have still right enough to follow out our declaratory conclusions; and we now confine ourselves

“entirely to these.” After this, I think it quite incompetent for them, in discussing these declaratory conclusions, to assume that they have a good right to succeed in the others. If the present discussion is to proceed upon any assumption as to the conclusions that are now withdrawn, I think it must be on the very opposite assumption. But at all events, I hold it to be indisputable, that we must now judge of the question of competency and Jurisdiction exactly as if there never had been any conclusions in the summons, but those to which it is admitted that our present judgment must be confined.

I do not reckon among these, the introductory conclusion, that one of these pursuers should be declared the undoubted patron of this parish, and the other his lawful presentee; because I think this has never been disputed by the defenders, and is now fully admitted on the record. Indeed, I take it to be a mere cavil to say, that the presentation is not completely and unconditionally sustained in their original minutes: no objection of any sort having been stated to its validity. The remaining conclusions, then, are merely, That the presbytery were bound to have taken the presentee on trials, and to have admitted him if found qualified; and that by refusing so to do, and by rejecting him on the ground of a dissent by a majority of the heads of families of the congregation, they have acted illegally, and to the prejudice of the patrimonial interests of both the pursuers. But no particular interests are specified; and I think it most material to observe, that it is not now sought to be declared, either that the stipend belongs to the pursuers, or either of them, or that the presbytery shall have no right to exercise their *jus devolutum* till the presentee has been lawfully found unqualified, and the remainder of the six months then allowed to expire, without a new presentation. In substance and in form we are asked merely to declare, that the presbytery ought to have tried and admitted the presentee; and that they acted illegally, and to the detriment of the pursuers, in not doing this, and in rejecting him.

Now, I am of opinion, that this court has no Jurisdiction to entertain such a question as this; and that the declarator ought therefore to be dismissed as incompetent.

I rest this opinion on these two grounds: 1st, That no civil interest is properly brought before us for judgment; and 2d, That the proceedings of the presbytery which we are thus called on to condemn, were proceedings in matters properly ecclesiastical; and as to which we have no power to adjudicate, either by declaratory or executorial decrees.

These two considerations run very much into each other; since, if the presbytery did not truly adjudicate on civil interests, we can scarcely be adjudicating on them, when we merely declare

that what they did was illegal, or point out what they ought to have done. It will be in some measure necessary therefore to consider them together. I may add, however, that if either of them is made out, I do not think the jurisdiction of this court can be maintained, even if it were assumed, that, in relation to the general statutes of the realm, the proceedings complained of had been *ultra vires* of the church courts; provided they were still within their own ecclesiastical province, and involved no assumption of civil jurisdiction. My opinion, however, is, (though that is on the merits) that they were not *ultra vires*; which I understand to be the only illegality with which they are now charged.

Now, though I do not think it seriously disputed that we have no jurisdiction in matters properly ecclesiastical, yet as something has been thrown out as if this court possessed some supereminent and peculiar power of correcting, or at least declaring, the errors or excesses of power of other independent judicatures, I think it right to say in the outset, that whatever may be the case with the court of Cassation in France, or even with the court of Queen's Bench in England, I am unable to discover the traces of any such prerogative or extraordinary authority in the Court of Session. In our judiciary system, I take it to be clear, that no tribunal has, either on review or originally, an unlimited jurisdiction over all the rights and interests of the subject. On the contrary, I think we recognise, in our judiciary establishment, several supreme courts, of co-ordinate and independent jurisdiction; each of which has a specific and well defined province, within which alone it has any authority, or power of acting; and beyond which, it has, in no case, any right to trespass, so as to encroach with effect upon the province or jurisdiction of another. This court, in particular, possessing, within its own province, as large powers, both in law and equity, as any court can possess, has by no means an universal or unlimited jurisdiction, even in questions of civil right. Till very lately it had no original jurisdiction in proper consistorial cases; which belonged to the commissaries; nor in proper maritime cases; which were for the Admiral; and even now it has no jurisdiction whatever in proper fiscal or revenue cases, which are exclusively for the Court of Exchequer; nor can it take cognisance even of ordinary actions of debt, unless the sum is above £.25, or the question is with one of its own members: But, at all events, it has no proper jurisdiction, except *in civilibus*. With a few exceptions not affecting the principle, it has no jurisdiction in *Crimes*, and, with no exception at all, it has none whatever in matters properly *Ecclesiastical*; and especially none as to the examination, ordination, or admission of ministers; which are not only in their own nature proper ecclesiastical proceedings, but are expressly declared, by the acts of 1567 and

1592, to be exclusively for the church judicatures. Now, the only question before us being, Whether one of these judicatures acted illegally in not examining, ordaining, and admitting a presentee, the conclusion which first suggests itself seems to be, that we can have no power to entertain such a question.

But it is said that civil interests are affected by the illegality; and that it is therefore competent for us to declare and correct it. Now it can only require to be suggested, that, though what the presbytery did (or refused to do) may, *in its consequences*, affect the civil interests of the pursuers, this can obviously afford no ground for saying that they adjudicated upon such interests; or that a civil court may therefore interfere with proceedings which were in other respects within their proper ecclesiastical province. There can hardly be any proceeding of any court which will not, in this way, affect the civil interests of the parties concerned. Take the case of a Court of Criminal Jurisdiction for example. Is there any punishment which it can award that will not most deeply affect the patrimonial interests of the culprit and his family? If a father is transported, are not the patrimonial interests of the children affected, as well as his own? But does the Court of Justiciary therefore, adjudicate on civil interests? Or can this court be called on to consider whether its sentences were illegal, because a strong civil interest might be advanced by finding that they were? In the same way, when the General Assembly *deposes* a clergyman for heresy or gross immorality, his civil interests and those of his family, necessarily suffer to a pitiable extent. But is the act of deposition the less an ecclesiastical proceeding on this account? or can it therefore be subjected to question before your Lordships?

It is plain, therefore, that *this indirect effect of* an ecclesiastical proceeding on civil interests, never can touch the real character of the proceeding, nor enter at all into the question of Jurisdiction; and yet I am really unable to see in what other way any of the patrimonial rights of the pursuers can be said to be affected by what has been done. I come at once, however, to the substantive ground of my opinion, when I say, That, in this whole matter of the appointment, and the consequent rights and liabilities of the ministers of our Church, and indeed in the whole matter of our Church establishment generally, I conceive there are properly *but two things* which are under the jurisdiction of the civil courts; And that all the rest are exclusively for the adjudication of courts ecclesiastical; and these two are the right of *Patronage* or presentation; and the right to the *Stipend* and other temporalities of the benefice. Every thing else is exclusively within the competence of the church courts and authorities. The original settlement of certain articles of religion and church go-

vernment, must indeed, have proceeded from, or at least with the concurrence and authority of the Legislature, or supreme civil power; and it must consequently be *ultra vires* of the Church to innovate materially upon these. But they are not left, on that account, to the cognizance of civil courts of law; and if any question arise, either as to their interpretation, or any alleged violation of them by individuals, I apprehend it to be certain, that it is in the Church courts alone that they can be determined; and that *we* can, in no such case, interfere, either originally or by process of review. All questions of *Heresy* accordingly, or *Discipline*, or generally of the relative rights of kirk-sessions, presbyteries, and synods in the government of the Church, are questions for the Church courts only. I think it is, if possible, still more clear, upon all practice and all principle, that the whole matters of the *Education* of candidates for the ministry, of their original *Licensing*, and afterwards of their *Calling*, their *Trials*, their *moral* character, their *Ordination*, and *Admission*, are exclusively with the same authorities. The civil court I apprehend cannot itself conduct, or regulate by its authority any one of those proceedings; or in fact interfere or look at them at all, except singly, where it is alleged, either that they had proceeded without the warrant of a *legal presentation*, or are made the pretext for an illegal exaction of *stipend*. It is very remarkable, accordingly, that all the cases to which the pursuers have referred, as establishing the right of this court to look into the proceedings of church courts, in this matter of the admission of ministers, have, without one exception, arisen either upon an existing competition for the right of *patronage* between two or more parties, or on a similar competition for a present right to draw or to retain *stipends*; nor has any thing more ever been adjudicated here, than was necessary to settle those purely civil interests, beyond which our predecessors have steadily, and as I think, most correctly, refused to interfere.

My firm conviction is, that farther than they went it is incompetent for us to go; and the sum of my opinion, in short, is, that, unless we are called upon to adjudicate upon a disputed claim to a Patronage, or to a Stipend, we never can look into the proceedings of church courts in the admission of ministers. But neither of these rights is here at issue; and all that is alleged is, that these, or some other patrimonial interests of the pursuers, may be affected or impaired by the consequences of these proceedings. As to the stipend, or other temporalities of the benefice, it is clear, that the presbytery are not the proper parties; and that no direct claim for these, much less an incidental reference to them, can ever support a civil action against such a body. I do not see, indeed, how any question on that subject can be raised by a

patron, except with an inducted minister; for while the cure is still vacant, (as is the case here,) there can be no doubt that the stipend must go to the Widows' Fund, or for pious uses within the parish: But at all events the presbytery have no concern with it. In every question then touching the settlement of a minister, which can be brought into a civil court with a presbytery, *the only* right to be adjudicated must be that of *Patronage alone*; and in so far as the precedents go, it is certain that the only ground upon which their proceedings have ever yet been even indirectly reviewed, has been, that they have taken upon them to judge with whom the right of patronage truly was, and have judged erroneously;—that they have assumed in short a civil jurisdiction; and have exercised it wrongly. In point of fact, accordingly, all the cases referred to were cases of disputed patronage, and nothing else; the competition being sometimes with a rival claimant of the right, and sometimes with the presbytery itself asserting their *jus devolutum*, (which is but another form of the civil right of presentation), in circumstances where it was denied that it had legally accrued. This court, no doubt, decided all these cases; as it was bound to do: But interfered no farther than to find, that where the presbytery had actually inducted the presentee of a wrong patron, or their own presentee where the *jus devolutum* had not legally attached, the induction could give no right to the temporalities; and that the vacant stipend must be retained for pious uses, as in the case of a continued vacancy. As to those purely civil rights, they did undoubtedly *disregard* the induction, and refused it any civil effect. But they never questioned its validity or legality as a proper ecclesiastical proceeding; and still less that of any of the formal steps by which it had been preceded; and so far from thinking it necessary to *Declare generally* that the church courts had acted illegally, or *ultra vires*, and far less to confine themselves to such a declaration, they have in every instance admitted, that the act of induction and ordination, if not set aside by the proper *ecclesiastical authorities*, must subsist as good and valid for all ecclesiastical purposes, and could not be questioned elsewhere.

The result of all these cases, in short, is merely this, That where a presbytery has judged wrong as to who had the civil right of presenting, this court will not recognize their induction of the wrong presentee, *as a title to the temporalities*: but will not meddle either with induction itself, or with any of its ecclesiastical preliminaries: And the ground of these judgments I humbly conceive to have been, That the right of patronage being a proper civil right, and the law giving to the presentees of lawful patrons, *and to them exclusively*, a right to the temporalities of a benefice, (which was also a civil or patrimo-

nial right), so no act of an ecclesiastical court could possibly give that civil right to any other parties; and that if the church courts had rashly taken upon them to judge of the right of a patron, and judged *erroneously*, and consequently inducted one who turned out not to be a lawful presentee, it was clearly competent for the civil courts to *disregard* that induction, *as a title to the temporalities*; although they could have nothing to say to it as the bond of a spiritual relation.

The difference, therefore, between these cases and the present, consists in these two most important particulars, which really convert them into authorities against the pursuers, and not in their favour, 1st, That in all these the question for adjudication in this court was clearly and unequivocally a question of mere civil right only—either a question as to which of two competing parties was the lawful patron, or the party then entitled to present;—or a question as to a present right to draw or to retain stipends, arising between an alleged patron and some one actually inducted on a presentation from some other claimant of the right: Whereas the only question *here* is merely whether the presbytery acted illegally in refusing to examine and admit a presentee to the office of the ministry,—there being no mention either of the right to *patronage* or *jus devolutum*, or the right to *stipend*, from one end to the other of their proceedings; or in that part of the summons on which alone we are now called on to determine; and 2d, That in all these former cases the ground on which the acts of the church courts were found ineffectual to give right to the temporalities, (and they were found ineffectual as to nothing else) was, that they had assumed to themselves to judge of the validity of the right of the patron, of which they were not competent to judge; and having judged *erroneously*, could not maintain any acts proceeding on that judgment, to the prejudice of his civil interests; Whereas in this case, the presbytery have not at all questioned the right of the patron; but on the contrary, have finally sustained his presentation, and fully admitted on the record that it was duly given in, and merely proceeded with the steps which the existing law of the church had prescribed for ascertaining the fitness of his presentee, (for so I view it), for performing the functions of a minister of the gospel, with edification to this particular people. In all the other cases, accordingly, there was a competition between *two persons* for the patronage, or the benefice; whereas there is nothing here but a question as to the fitness of admitting the only individual who lays claim to it, and who is allowed to be the undoubted presentee of the undoubted patron.

The contrast, in short, between these cases and the present amounts to no less than this, that in them the Court, even when

compelled to consider the illegality of the presbytery's proceeding, as directly prejudging a civil interest, studiously abstained from finding or declaring that illegality; but simply decided the civil question before them,—passing over the incompetent proceeding *sub silentio*; while we are now called upon to decide no civil right whatever, but merely to Declare illegal a certain act of the presbytery, which adjudicated on no civil right, but was strictly in the course of their ecclesiastical procedure. Our predecessors, in short, thought it incompetent to declare the whole complex act of a presbytery in *admitting* a presentee illegal,—though their judgment in the civil suit necessarily proceeded on the assumption that the initiatory step of it, (the sustaining a wrong presentation), was not only illegal, but incompetent,—because the other parts of it, (*viz.* the call, examination and induction), were properly ecclesiastical; while we are now required merely to Declare their complex act, in *rejecting* a presentee illegal; although no civil suit is before us, and every part of that act was purely ecclesiastical, except that which is *not* complained of,—the sustaining the presentation.

But it is said, that though nominally sustained by the presbytery, the presentation (which was the assertion of a civil right) was substantially rejected, or at least its authority unduly restrained, by requiring the concurrence of a majority of householders to give it effect; and that this was equivalent to declaring that it was only to be sustained if countersigned or indorsed by this majority. I humbly apprehend, however, that this is but a figure of speech. It may as well be said, in any case, that the presentation is only to be sustained if countersigned by a majority of the presbytery; since before it can be effectual, such a majority must concur with the patron in setting forth that they are satisfied with the literature, orthodoxy, &c. of the presentee. The concurrence of the heads of families is undeniably as much an ecclesiastical proceeding, and required as much for spiritual purposes, as the testimony of the examining presbytery; and may be equally said to affect disadvantageously the rights of the patron and presentee. But this indirect and consequential effect of an ecclesiastical proceeding will never subject the proceeding itself to censure in a civil tribunal.

Again, it is said, that this allowance of a *veto* on the act of the patron makes his civil right of patronage a mere *precarious* right, or no right at all; and this substantially imports an invasion of his civil interests. But the same answer occurs here. If indeed it could be made out that nothing of the nature of a call or concurrence of the people had ever before been heard of, and that the *veto* was a mere device for communicating a new civil right to the congregation, there might be something in this ground of objec-

tion. But if the concurrence of the people be, as I take it to be, an ancient, necessary ecclesiastical preliminary to the admission of a presentee, and this new way of taking dissents is but a *regulation* of that proceeding, his rejection, where it cannot be obtained, is only in the same predicament with his rejection because he cannot obtain the presbytery's approbation of his qualifications. Both are undoubted limitations of an *absolute right* of appointment. But a patron's right is not, according to our law, absolute or unlimited; though it is far enough from being annihilated by either of these limitations. I cannot at all concur in the doctrine, that the existence of a *veto* on the exercise of any right is equivalent to a destruction of that right. The House of Lords has a *veto* on all the legislative acts of the House of Commons, and they on those of the Lords; and the Sovereign has a *veto* on both. But shall we say, therefore, that neither of the Houses of Parliament, or both together, have any legislative power? Every juror in civil causes has in substance a *veto* upon all the rest; but it will scarcely be contended that none of them have any power. All that is truly required is, that there shall be a concurrence,—not however in the nomination, which is solely in the patron,—but in the approbation which his presentee must also obtain in other quarters; and that approbation is an established part of the ecclesiastical procedure towards ordination, with which the civil court can never interfere, merely on account of the indirect and consequential effect it may have on civil interests.

These, I think, are the topics chiefly urged to prove that the civil interests of the patron were directly invaded by the proceedings of the presbytery. For the presentee, it was further urged, that the right to be taken on trials and (contingently) to be admitted, is an *inchoate* civil right vested by the presentation; and that in refusing to give effect to it, the presbytery violated a civil obligation. The satisfying answer is, that they do not refuse to admit; but insist upon only admitting according to their own rules and principles. And when it is farther asked, whether we should hesitate to decern the Corporation of Surgeons, for example, to take an apprentice on trial, and admit him if found qualified, I would still make the same answer. In such a case, I think, we should not hesitate. But I think also that the nature of the illustration shews the fallacy of the proposition it is meant to illustrate. The Corporation of Surgeons is one of the many subordinate *civil* institutions, over which the control of this court is clear and undoubted; and the rights to be gained by admission as one of its members are purely civil rights: to be asserted accordingly, at every stage, in a court of civil jurisdiction. But the Presbytery and the General Assembly are both ecclesiastical courts; and the Assembly is to the Presbytery what we are to the corporation:

While it is not, and cannot be denied, that the whole order of admitting to the office of the ministry is a purely ecclesiastical proceeding; and that the rights acquired by such admission are, in every thing but the temporalities, to be adjudicated only by ecclesiastical tribunals. Your Lordships accordingly, might properly enough *decern* the surgeons to admit a qualified apprentice, and you might also *inforce* your decret by *diligence*. But is it pretended that you could *decern* the General Assembly to grant the solemn spiritual rite of ordination, which is primarily the consummation of a purely spiritual relation; and only incidentally, and as it were accidentally, connected with any temporal emoluments—capable, undoubtedly, of subsisting without them; and held *presumptione juris et de jure*, to be granted or withheld, in all cases, upon considerations of conscience and religion alone? But if you cannot *decern* and *enforce* this, because it is a *spiritual* obligation, how can you in this instance *declare* it to be an obligation at all? The proceeding complained of, in short, is essentially ecclesiastical; and its bearing on civil interests but contingent and consequential.

But there is still another criterion by which, I think, it may easily be determined whether the proceedings of the presbytery were truly in their ecclesiastical province or not—and that is by considering the *End and Object* of those proceedings. In sustaining or refusing to sustain a presentation, the presbytery judge in a civil right, and act therefore at their peril. If they judge wrong; nothing else they may afterwards do will effect the temporalities; just because all they can then do is ecclesiastical. The object in judging of the presentation was simply to ascertain who was the true patron—or a point of mere civil right; But what is the object of the subsequent proceedings? Is it, or can it be represented as any thing else than *to ascertain the fitness of the presentee* to minister successfully in holy things to that particular people? and can their proceedings to that end be the subject of discussion in a civil court? It is said that the right to be taken on trials is a civil right, and a step to a valuable *status*. But what is the *object of the trial* but to prove the capacity of the party for religious services? surely not for enjoying the temporalities of the office. The only *status* which the church can pretend to bestow, is a spiritual and ecclesiastical *status* bestowed by the solemn rite of ordination; and every test and every requisite it ordains as conditions of obtaining that *status*, are necessarily ecclesiastical also. If it be a part of the law and order of the church, that before they can be justified in ordaining an individual as the pastor of a particular congregation, they must be satisfied that he is not unacceptable to a certain part of it, is it not plain that the proceedings necessary for obtaining that satisfaction must, whatever

else they may be, be at least proper ecclesiastical proceedings? as forming part of those provisions for spiritual edification, which, above all others, deserve that appellation, and are by their very description exclusive of all civil control.

In all the cases hitherto where the civil court has interfered, the presbytery had manifestly usurped a civil jurisdiction; and had adjudged erroneously upon matters which it was the privilege of the civil courts alone to determine. But here there is not the shadow of a civil right alluded to, or once touched upon in the whole course of their proceedings; and so far from assuming the cognizance of any question peculiar to this court, it is indisputable that this court could never have looked at the questions truly disposed of by them, either as to their general end and object, or the means adopted to attain this end. The question intended to be settled by the act of 1834, and practically adjudicated under that act by the presbytery, obviously was, Whether it was for Christianedification that any one should be received as the minister of a parish who was opposed, upon conscientious grounds, by a majority of the heads of families within it? But can it ever be said that *this* is a question for a civil court? The Assembly may have raised or decided that question injudiciously,—they may even have gone beyond their powers in raising and deciding it. But the only question here is, have they in so doing encroached upon the province of the civil courts? Is not what is here complained of, in short, an enactment and a proceeding in matters, and for purposes, purely ecclesiastical? and therefore in matters as to which no civil tribunal can either determine or direct?

In the last place, on this question of jurisdiction, I would refer to the great, and I think insurmountable difficulties which are evidently in the way of our giving any practical effect to the judgment we are asked to pronounce; and to the plain inference which I think is to be drawn from the act 1592, c. 117, that the remedy (of retaining the stipend) there given, is the only remedy (and I think it sufficient) that was intended. It does, I own, appear to me altogether inconceivable, as I believe it to be without precedent or analogy, that a court of supreme jurisdiction, should have power to declare what a party competently brought before it ought not to have done, and what it ought to do, if it have not power also to decern and ordain it to undo what has been wrong done, and to do what is right; and also to enforce its decree, by the usual executorials of the law. The pursuers I think asserted broadly enough that this court had such a power. But I rather think none of your lordships have gone that length: and indeed, when it is considered that you cannot possibly stop short of the sacred rite of *ordination*,—since without that there can be no admission to the benefice,—it is utterly impossible for me to

hold that we can decern a church judicature to confer that rite upon one, whom, upon spiritual considerations, they think unfit to receive it; and to issue horning and caption against those who may conscientiously refuse. It is quite in vain to take distinctions; or to disguise the difficulty, by dividing the process into its several stages. What is asked for this presentee, is *full admission* to the office of the ministry, and nothing else. I, for my part, think, the whole of the proceedings, after sustaining the presentation, are properly ecclesiastical: but at all events it is clear, that the concluding and most important part of them, is purely so. And if that cannot be dispensed with, and is distinctly required by the pursuer, how can we possibly decern the presbytery to admit, without intruding, in the most flagrant manner almost that can be imagined, on their sacred and peculiar province? It would be but a little greater profanation, if we were asked to order a church court to admit a party to the communion table, whom they had repelled from it on religious grounds; because he had satisfied us that he was prejudiced in the exercise of his civil rights by the exclusion.

It has been thrown out, though with great deference I think inconsiderately, that though we could scarcely issue an executorial decree for the admission of this presentee, we might sustain an action of damages against the presbytery for not admitting. To my judgment, this is even more startling than the proposal to decern. If the presbytery, acting it may be erroneously, but from a conscientious sense of duty, and in obedience to instructions from their superiors, are to be liable in damages for a judicial deliverance rejecting a presentee, I do not see why this court might not also be subjected, if we had all thought, (as I do) that the presbytery was right, and if our judgment had been reversed upon appeal. But if the presbytery are liable, so must the General Assembly; and I rather think the whole body of the church which they are entitled to represent. The Assembly at any rate, might have been called as joint defenders; and certainly in a process of relief. But is it seriously suggested, that our courts should afford the strange and revolting spectacle of the whole body of the church, sisted as defenders in an action of damages at the instance of a licentiate of that church, for the offence of having passed a law, after years of mature deliberation, and the solemn approval of overtures by most of its presbyteries, because it is alleged that some supposed civil interests of his have been affected by that law? Whatever other remedy may be suggested, I feel assured that this never will be resorted to.

But has not the Legislature itself provided, and sufficiently, for the remedy? By 1592, c. 117, if the presbytery unlawfully refuse to admit, the patron may retain the stipend: and by the

decisions of last century, it is fixed that this right of retention still continues, even after the admission of a minister; if it turn out that he was not a lawful presentee. For the civil rights of the patron then, is not this protection enough? and up to the present moment, it has never been surmised that the presentee had any civil or patrimonial right, till after he had obtained induction. Such a claim is one of the many novelties of the present unfortunate litigation; and it seems to me to be advanced, not only in the face of the statute referred to, but of the terms of his own presentation—hitherto his only title—which assigns him into the temporalities, only “so long as he shall serve the cure at the said church,” which confessedly he has never begun to serve. The only vested civil interest therefore contemplated by the legislature, seems sufficiently provided for by this statutory protection: and taking that fact along with the inextricable difficulties of giving effect to any other, I think it manifest that there is no ground whatever, for any interference with the proceedings of the church court. And, therefore, and on the whole matter I am bound to conclude, that no civil right or interest was truly adjudicated in this case by the presbytery, and that we should not be giving judgment on any such right, but on a proper ecclesiastical proceeding, if we were to declare that they had acted illegally; and that on this ground alone the action as now limited cannot be maintained.

But it is said that, even admitting that the procedure, in so far as regards the presbytery and its objects, may be held to have been ecclesiastical, they still involved the civil right of the patron so directly that we may take cognizance of them to that effect, and pronounce upon their validity, in so far as may be necessary to explicate our own jurisdiction.

Now there is room here, and great need I think also, for several distinctions; and by going with some precision into these, I think I shall be able to bring out my views of the whole case, more clearly perhaps than I have yet done, or than I could well do in any other way.

In the first place, it is quite certain that a civil court has a clear right to adjudicate for civil purposes, upon the very *same facts* on which questions peculiar to other courts, ecclesiastical, for example, or criminal, may also be raised. Thus, though this court has no jurisdiction in robbery, the noted M'Coul or Moffat was first proved to have robbed the Paisley Bank in a civil action in this court, and before a jury. But in that proceeding there was no question properly of his *guilt* or *innocence*; nor was it there of any consequence whether his act in taking the money was criminal or lawful. He sued the bank, I think, upon certain deposit receipts; and they stated in defence that he owed them a great

deal more, having taken away large parcels of their notes, for which he was bound to account. In the course of proving this defence, they fully proved the robbery, not, however, as a crime, but merely as tracing their property into his hand, and thus raising a compensating debt against him. There had, in point of fact, been no criminal proceeding at this time against him ; so that there was not a colour for saying that the jurisdiction of the Justiciary had been interfered with. But although there had been a process, trial, and *acquittal*, in that court, this could plainly have been no bar to proving the bank's defence in the civil action ; any more than the success of that defence would have been a bar either to the subsequent trial in Justiciary, or to a verdict and sentence of acquittal, if a different view had been there taken of the evidence. In the same way, a man previously tried and acquitted on a criminal charge, for wilfully burning his house to defraud the insurers, was afterwards found to have wilfully burned it, in a civil action on the policy, where the insurers were allowed in this way to establish that the fire was not accidental, for which alone they were answerable.

This class of cases, I am aware, may seem to have but little bearing on the present, as there is here no independent question of civil right, nor anything else, indeed, prayed for but a declarator of the illegality of what was done by the presbytery. But I think it right to refer to them, for the purpose of remarking, that when a clear civil interest thus arises out of facts which may have been previously viewed differently, for other purposes, in other courts, the civil court will *merely disregard* the proceedings of such other courts, and proceed to dispose of the interests submitted for its decision, upon the facts brought before it, without the least regard to the views or opinions which may have been entertained with regard to them elsewhere. Above all, it will never think of prefacing its own judgment by Declaring that the previous proceedings of other courts were wrong and illegal ; and most certainly would have no right so to find or declare. Most of the cases of privilege, or conflict between courts of law and the Houses of Parliament, truly belong to this category. In all of these, the judgment of the court was merely asked upon facts bearing confessedly on civil rights ; and no proposal was ever made to pass a sentence directly censuring or condemning what had been done in Parliament ; but only a right asserted to disregard and pass by what had been done there ; and a refusal to recognise what was done as any bar to the court proceeding in the exercise of its own admitted jurisdiction.

But there is another class of cases in which a supreme civil court may not only be actually cognisant of proceedings touching the same matters in other independent courts, but may be bound

to take notice of such proceedings ; and hold its jurisdiction, even in a matter of clear civil right, only in subordination to their decision, and without any power to question or reverse it. One obvious instance of this might occur in the ordinary case, where a reward provided to an informer on the conviction of a felon in the court of justiciary, is made recoverable only in the Court of Session. If the culprit, instead of being convicted, is acquitted, I take it to be clear that the party could never come into this court and pray us to find that the acquittal was wrong and illegal, and that we should notwithstanding decern for the reward : and that this direct civil interest, and allegation of injustice, could never induce us or look at such a demand. The previous conviction in Justiciary would there be viewed as a condition precedent of the vesting of an actionable right to the reward. But if induction by a church court is necessary (as I assume it to be), to vest any patrimonial interest in a benefice, is it not equally necessary that the presentee at least should have that induction, before he can sist himself as a suitor for any civil interest ? It may be said, that the parallel is not complete, because the pursuers are not now actually seeking the temporalities of the benefice, nor even an order on the church courts to take the presentee on trials ; but only a finding that the presbytery ought to have tried and inducted, and acted illegally in refusing. A very little change, however, in the supposed case will serve to complete the parallel, and obviate this objection. Suppose that, instead of acquitting the pannel after trial, the Court of Justiciary had been complained of for having thrown out the libel as irrelevant, or for having adjourned the trial from diet to diet, on what the informer alleged to be unjust and illegal pretences, or rather for want of the concurrence of a prosecutor, which he contended to be unnecessary ; and that the conclusion of the suit here had become, that we should find and declare that they were bound to have brought the offender timeously to trial, and had acted illegally, and to the prejudice of his patrimonial interests, in refusing,—could we possibly have held ourselves competent to such a case ? or in what material respects does it differ from the present ? If a trial and conviction in Justiciary is necessary to vest the civil right, by the express terms of a supposed statute in one case, is not induction equally necessary in the other, to vest the civil right to the benefice ? and if this court could neither ordain the Justiciary to proceed to trial, nor declare that they were bound to have so proceeded, and had acted illegally in refusing,—upon what ground is it to be maintained that we are competent to proceed as now required with this presbytery ?

The principle upon which the whole question depends may be made still clearer, however, by attending to a *third* class of cases,

intermediate in some respects between the other two, and yet resting entirely on the same principle. I mean those cases in which a court may be forced to encroach on the proper jurisdiction of another, and to judge, as it were, in its *vice*, in order to explicate for the time, its own proper jurisdiction. Thus, the Consistorial Courts alone could decide in disputed questions of legitimacy and marriage, and by their decree only fix the rights of the parties, so as not to admit of dispute (while that decree stood unreduced) in any other quarter. But if a question of civil right, depending on the fact of marriage or no marriage, were brought into this court, as upon the alleged surcease of an annuity granted only while the party was unmarried, it might be indispensable for the extrication of that question, that the fact of marriage or no marriage should be tried in this tribunal. We might recommend, indeed, to the parties to have it tried in a proper declarator before the commissaries, and propose to sist the civil suit till this was done. But the third party averring the marriage in order to get rid of the annuity, would evidently have no title to pursue such a declarator, and would be without the means of compelling his opponent to proceed with it; so that it might be indispensable for this court to try the Consistorial question themselves. The same might even be necessary in the Court of Justiciary, where the investigation would be still more inconvenient. If a man indicted for bigamy should plead in defence that his first alleged marriage was no marriage at all, but an union of a different description, I do not see how that court could avoid going into the question, and judging of it precisely as the commissaries could have done in a declarator, or an action of putting to silence. In the same way, the House of Lords, or rather the sovereign, acting by a delegation to that body, is the only proper final authority for settling disputed questions of peerage; and a declarator of such a right certainly could not be maintained in this court. But if the proper civil interest of an heir of entail alleging that the estate had devolved upon him, because the heir in possession had succeeded to a peerage, his right being liable to defeasance on that ground, were brought into this court, it would be necessary for us to trespass to this effect on that high and peculiar jurisdiction. The case actually occurred, as your Lordships may remember, with the late Earl of Caithness, (2d Feb. 1790), when, upon the allegation of no higher an interest than that of certain freeholders to remove his name from their roll, on account of this alleged disqualification, the court allowed the complainers to prove that he was actually Earl of Caithness; though the necessity of proceeding with the proof was superseded by his openly claiming and being admitted to the dignity. There is an earlier and more remarkable instance, (already al-

luded to by your Lordship for another purpose), in the case of the Earl of Banbury in England, where, having been indicted for murder by the name of Nicholas Knollys, and a commoner, Lord Chief Justice Holt, allowed him to prove the peerage, both as establishing a misnomer in the indictment, and with a view to a claim of privilege.

But though it is thus certain that courts may occasionally trespass in this way on the peculiar province and jurisdiction of other courts, it is most material to observe, 1st, That this can never be done except where it is indispensably necessary for the extrication of some civil interest directly and properly brought for judgment in the court where the question arises. 2d, That it can only be allowed where there has been *no previous adjudication* of the proper court for trying the incidental question, and where there are no ready means of obtaining their judgment. If there be a final decreet of the commissaries establishing a marriage, this must be conclusive of the fact, when put in evidence, in all other tribunals; and while that stood unreduced, neither this court nor the Court of Justiciary could possibly allow the party to show incidentally that this decree was erroneous. 3d, The effect of the decision given on this necessarily assumed jurisdiction can never extend beyond the case to which it was incidental, and may not always be *permanently* authoritative even as to that case. At all events, it can in no degree limit or affect the full and overruling authority of that court within whose peculiar province it naturally lay, if the matter should ever afterwards come for adjudication before it. If an alleged bigamist gets an acquittal in justiciary, by satisfying that court that his first alleged marriage was not a lawful marriage at all, this will never preclude the wife from pursuing a declarator before the commissaries, nor interfere with her full enjoyment of all conjugal rights, if she succeed in it. The pannel, indeed, probably would not lose the benefit of the acquittal; because the law does not allow favourable verdicts *in criminalibus* to be overturned; but the result might be different as to the supposed case of the annuity in the civil court. If the annuitant had been found still liable, because the court on that incidental inquiry had found there was no marriage, it would rather seem that he might open up the decree as upon *res noviter veniens ad notitiam*, if it was afterwards established by a final decreet of the commissaries that there had truly been a valid marriage, at and before the time of such incidental judgment; and the same in the case of the heir of entail, who had failed to make out the forfeiting peerage in his claim under the clause of devolution, but afterwards saw it established, as of anterior date, by a report of the Lord's Committee of Privileges.

But however that may be, it is enough for the present purpose

that such incidental extensions of jurisdiction can never be permitted, where there has been *already* a judgment of the proper tribunal, to whose province the matter, *sua natura*, exclusively belongs; and on which province no other court can be permitted to trespass, except where its own oracles are silent or inaccessible, to those who would consult them. In the present case, it will be remembered, first, that there was here a final judgment of the church courts in a matter now assumed (and I think proved) to be clearly ecclesiastical; and second, that there not only is no present or direct civil interest on which our judgment is sought; but that the only thing we are called on to do, is, to find that this final judgment of the presbytery was illegal, and injurious generally to the patrimonial interests of the pursuers.

Though I fear I have gone into the exposition of my views on this branch of the question more largely than your Lordships may think necessary, I cannot help adding one other illustration of the necessary conditions, and limited effect of this incidental jurisdiction, *extra provinciam*, which all courts may occasionally be led to assume; because it brings us back to the distinction between ecclesiastical and civil jurisdiction, which is here immediately in question; and is in some respects the *converse* of the case maintained by the pursuers.

I have already said, and we are all agreed, that the right of patronage is purely a civil right, and that the church courts have no proper or original jurisdiction in regard to it. Yet they, too, may sometimes be led, or even compelled, for the explication of their own proper jurisdiction, to assume a right to judge of it,—I mean as much compelled as this court can ever be to encroach on the province of the commissaries or the House of Lords. The motives for their waiting till the decision of the appropriate courts, may, indeed, be stronger than in most other cases; as the consequences of their making a mistake in the exercise of their incidental jurisdiction may be more embarrassing. But the principles are the same. When a vacancy occurs in a parish, it is the exclusive right and first duty of the presbytery to proceed to the admission of a qualified presentee with as little delay as possible, their chief concern in the matter being not to leave the flock unprovided with a pastor longer than may be absolutely necessary. But they are not upon this account to receive any one as a lawful patron who may choose to assume that character, and to lay a presentation on their table. Where there has been no former use of presenting, and no title produced, they are not only entitled, but bound to inquire, and to satisfy themselves to a certain extent, before sustaining the presentation. Where the right of patronage is disputed, and there are two or more competing presentations, the better, and the more usual way in modern times certainly is,

to sist proceedings till the judgment of the civil court is obtained. But this may not always be practicable; as where the parties shrink from the expense of a litigation in this court, and yet persist in their pretensions before the presbytery; and may sometimes be attended with such inconvenience as to make it seem reasonable rather to run the risk of an induction which may not carry the temporalities, than to leave the parish without any settled means of religious comfort and instruction for an indefinite period of time. In such cases, accordingly, presbyteries, like all other courts, have assumed a jurisdiction *extra provinciam*, and sustained or rejected presentations, so as to explicate their own clear right to examine and induct, at the time, though certainly not to the effect of excluding the subsequent judgment of the appropriate court on the subject, and at the peril of having all the patrimonial interests of the parties adjudicated, not according to *their* incidental decision, but according to the final judgment of the only natural and binding authority. What the civil court alters, however, or rather disregards and passes by as of no avail, is only what was erroneously decided by the church court upon this assumed and incidental jurisdiction,—that is, only their decision upon the civil question of patronage. The actual induction they may have engrafted upon it, together with all that was truly ecclesiastical in their previous proceedings, remains untouched and unquestionable by us,—just as unquestionable, as a previous judgment of ours on the right of patronage would and must have been with the presbytery.

My opinion, in short, on the whole matter is, that when they have once *rightly sustained the presentation of the true patron*, the proceedings of the presbytery are beyond the control, as being entirely out of the jurisdiction of the civil courts. It is at that stage alone that they are liable to our interference and review, because it is there only that they come in contact with a matter of civil right; but when that stage is safely past, all the rest is for the cognizance of the church courts, or the legislature alone. Their proceedings may be unwise, irregular, or unfair; they may even be beyond their legal powers, but still, being proceedings of an ecclesiastical nature, and for spiritual purposes, they are not within the jurisdiction of any civil tribunal.

In saying this, I of course reject the proposition which I understand to have been maintained by the pursuers, to the effect that, if the proceedings of the church courts have been in any respect *ultra vires*, they may be declared by us to have been illegal; even though, in a general sense, the matters disposed of by them were of ecclesiastical competence, and not otherwise subject to our jurisdiction. I must now trouble your Lordships with some of the reasons which have led me to reject this proposition.

In the first place, I am humbly of opinion, that though a court should act *ultra vires*, still if it were acting within its own proper province, or in relation to that class of cases or interests to which it alone was competent, no other court can encroach upon that province, or go beyond its own, either to correct or to declare that excess or illegality,—the remedy in such an extremity being in parliament alone. But in the second place, I am humbly of opinion that the proceedings complained of in this case were not *ultra vires* of the General Assembly or the presbytery.

Upon the first I would take a familiar illustration. The punishment of high treason is death; and no court has power upon conviction to inflict a lighter penalty. But suppose the Court of Justiciary to receive the verdict of guilty, and on this to sentence the convict only to a year's imprisonment, such a sentence would undoubtedly be *ultra vires* of that supreme court, and it is easy to suppose civil interests enough to apply for its correction. Suppose the traitor were an heir of entail, and the last of that branch of the substitution to which he belonged, and that action was brought in this court by the next substitute of a new branch, to whom the succession would of course have come upon the expiration or running out of the forfeiture by his death, to have it found and declared that the Court of Justiciary were bound to have given sentence of death, and not only acted illegally, and to his prejudice, but plainly incompetently and *ultra vires*, in giving any other sentence,—could we possibly sustain any such action, and thus pass sentence on the solemn and irrevocable judgment of another supreme tribunal, within its own sphere of action? I humbly conceive we could not.

But the best and most striking proof, that the mere fact of the act of an independent court being *ultra vires* will not warrant the interference of another court, either to correct or to declare the excess, provided it be not also an encroachment on the province of that other court, is to be found in the admission, established by all the cases referred to, and unequivocally made by the pursuers in this process, that an induction once completed, though of an incompetent presentee, must still subsist *quoad spiritualia*, although disregarded and disallowed in the civil court as a title to temporalities. If the statutes of 1592 and 1711 mean anything, they mean that presbyteries shall only induct the presentees of lawful patrons to patronate livings; and that the induction of any other persons is beyond their legal powers. It is upon this precise assumption accordingly that the civil court has always disregarded such inductions as giving any right to the temporalities: and their judgments are absurd and inexplicable on any other ground. But if being *ultra vires* gave them a jurisdiction over them *quoad omnia*—and warranted them to declare them, in general terms, fundamentally null and illegal, how is it that in most of these cases,

the presentee of a pretended patron, being once inducted, was yet allowed to hold the spiritual function of parish minister, exclusively entitled to perform the offices of religion within it : and actually, by his incumbency, to prevent the induction of any other person, either to enjoy the endowment, or to attend to the cure of souls ; while he himself was found not entitled to any part of the temporalities, purely because his induction was held to be *ultra vires* by the court to whom the right to adjudge as to the temporalities, but as to nothing else, belonged ? The only and the obvious answer is, that he was so allowed because it was felt and acknowledged that the civil court could only adjudicate upon what was properly civil : and that an error in a proper ecclesiastical proceeding, whether occasioned by an illegal assumption of power, or by any other cause, was entirely beyond its cognizance and jurisdiction. If it had not been so felt, how can it be explained that in the cases of Auchtermuchty, and Lanark, and others, the admission of the party found not entitled to the temporalities was not reduced and set aside *in toto*, or an order at least made on the church to recall and undo it—and the field thus cleared for the admission of the proper presentee, to the *whole emoluments* of the benefice, instead of leaving the parish in the awkward and almost scandalous position, of having the cure of souls in the hands of a regular minister, without an endowment, and the whole temporalities locked up, it might be for years, in the hands of the patron, for pious uses for which there was no demand ?

Another and a still more striking illustration may be taken from this same department of the law. It is provided by the act 1592, that all questions of *Heresy* shall be for the church judicatures alone ; and it is certain that the Confession of Faith was fixed by act 1567 and prior acts, as the standard of that religion, which the church was primarily ordered and established to maintain. Nothing could therefore be more radically *ultra vires* than for her judicatures to desert that standard, and adopt other articles of belief and doctrine. But suppose it were to happen that the majority of the church became heretical ; and that in this state a patron who adhered to the old faith gave a presentation to one who was of the same persuasion, and that, on account of that very adherence to the statutory standard he was rejected by the Presbytery and the Assembly as heretical, and unsound in doctrine ? *Could this court* possibly interfere to correct this flagrant illegality, and monstrous *excess of power* ? although the civil interest both of patron and presentee were affected by it as directly at least as they can be said to be here. Could your Lordships take the genuine Confession of Faith in one hand, and the new he-

retical articles in the other, call for the minutes of the examination of the presentee, and if satisfied that he was right, and his ecclesiastical judges wrong, could you declare their proceeding illegal and *ultra vires*, or ordain them forthwith to retract and admit the presentee? I take it for granted that no one will maintain the affirmative; and consequently that it is clear, and upon plain principles, that mere excess of power, if within the proper province of the court, will never entitle any other, whose province has not been invaded, to interfere.

All human tribunals are necessarily liable to error and mistake; and mistakes by exceeding their powers, or forgetting their limitation, are by no means the most unusual or the least venial of their errors. When this happens to *inferior* courts, the remedy is plain enough; but when a *supreme* court falls into this or any other error, (for on principle I see no distinction,) I know of no remedy but in the legislature; and conceive that nothing could be more unconstitutional than to allow one fallible tribunal to trespass beyond the field of its proper jurisdiction, to remedy, or rather not to remedy but only to *Declare* an excess of power alleged to have been committed, though *within its own province*, by another. The powers of this court, though undoubtedly very ample, are limited in many respects, as well as those of other courts, even within its own proper sphere of civil jurisdiction. There are not only various departments of civil rights over which it has no cognizance; but there are express limitations of its judicial discretion in many special parts of those which come properly before it. The whole bankrupt act is full of such limitations; and the special acts under which entailed estates may be sold or exchanged. We are restrained also from modifying the penalties under the act 1701; and in many other particulars. In all those cases we are daily in danger of deciding not only erroneously, but *ultra vires*; but if our judgment is final, and beyond even an appeal to the House of Lords, I am not aware either that there can be any remedy, or that it has ever been thought harder that parties should suffer by a final sentence which is erroneous by being *ultra vires*, than by a sentence erroneous, on any other account. Now the sentence of the church courts rejecting a presentee on religious grounds, is as final and as incapable of being reviewed in the ordinary course, as any sentence of ours could be after an affirmance by the Lords; and being, as I now assume it to be, a sentence in its own proper ecclesiastical department, it appears to me altogether anomalous to make it the subject of any finding or judgment of ours, merely on an allegation that it may have been beyond the limited powers with which such courts had been entrusted, even in mat-

ters properly ecclesiastical. If it had been *extra provinciam*, as well as *ultra vires*, and if it had encroached upon our province as well as gone beyond its own, the case would have been different. But being in its own province, its being beyond the limits assigned to it within that province by the legislature, the question of excess can only be between it and that supreme power whose injunctions it is said to have transgressed; exactly as our excesses must be, when we adjudicate, within our proper department of civil interests, but beyond the special limits to which our jurisdiction in that department has been restrained by the same supreme authority.

The truth is, that no system of mere Jurisprudence can ever afford redress for such occasional errors or excesses of power by supreme courts, while acting within their several departments. When they trespass on the province of other courts, the remedy is for these courts totally to *disregard* the usurpation, and to proceed with their own business, as if no such intrusion had occurred. The law and the constitution presume that no such excesses will be committed; and they trust as much to one supreme court, or to the judicial establishments in one department of law, as to another; and certainly have not invested any one with any peculiar visitatorial right of going out of its own department to note the errors of another. In the theory of the constitution the supreme courts of the country are held to be nearly as incapable of doing wrong as the Sovereign herself; and though known to be fallible in fact, are presumed to be so *equally* fallible, as not to be trusted with the correction of each others' errors. It is true that this court alone can proceed by *Declarator*; and may therefore have more facility, in point of *form*, than any other, in arraigning the conduct of its neighbours; but in *substance*, I am unable to see that it has any higher powers of castigation; and I am not aware that it has ever been seriously maintained that the fact, or rather the mere allegation, of a supreme criminal or ecclesiastical court having gone beyond its *statutory* powers in judging, in some question of crime for example, or church discipline, should give a jurisdiction to this court to inquire into the matter, and to Declare merely, to the world that such an excess has been committed.

But assuming that the judgment complained of might be made the subject of declarator here, if in fact it was *ultra vires* of the judicature which pronounced it, I come, in the last place, to consider whether there are grounds for holding that the proceeding here was truly *ultra vires* of the church courts, or not; and I am humbly of opinion that it was not.

The ground for the opposite proposition, I understand, is the

provision in the acts of 1592 and 1711, that presbyteries shall be bound to admit the qualified presentees of lawful patrons; and it is said that the rejection of the pursuer in this case, on the ground of the dissents of the parishioners, is a plain violation of this injunction. I confess I think this a very narrow ground for so strong an inference. I avoid entering into the question whether this particular provision of the act 1592 can be held to be now existing, upon a fair construction of the two acts of 1690, c. 5, and c. 23, and the act 1711; because I am satisfied that in that last act there is a substantial re-enactment of that provision of 1592, binding and obliging presbyteries to admit qualified presentees, as they ought to have been previously admitted.

The true question then is, on what grounds the presbyteries were entitled to refuse admission, after they had rightly sustained the presentation? and first of all, it is necessary, as the pursuers rest entirely on the terms of these statutory provisions, to recollect that the whole provisions of the act 1567, c. 7, are expressly ratified, and consequently re-enacted by this statute of 1592; that is to say, that the act 1581, c. 1, is there expressly ratified, in all its heads, and one of these is the ratification of 1567; containing, as your Lordships are aware, the important declaration, that where a presentee is rejected by the Superintendents, (then standing in place of presbyteries) the ultimate appeal is to the General Assembly, by whose decision the cause shall take end.

This statute of 1567 was therefore revived in all its heads and articles, along with that of 1592, by that of 1690, c. 5, and is now a subsisting enactment—presbyteries being only substituted for superintendents in virtue of 1592; and although the point has not been so fully argued to us as some others, I am of opinion that it truly applies to all cases in which the presbytery actually refuses to admit a presentee, whether on account of disqualifications disclosed during their own examinations of him, or of other objections which arise in the course of their ecclesiastical proceedings, subsequent to their sustaining his presentation; and that it limits the right of appeal, in all such cases, to the church judicatures exclusively. I am satisfied, however, that it does not apply to cases where *the presentation itself* had been rejected by them, on the ground of the alleged patron not being truly entitled to that character. In the first place, because, that being a civil right, it is not to be presumed, without express words, that it was intended to leave it to the ecclesiastical tribunals; and 2d, because the words of the statute plainly assume that, in the cases to which it applies, the title of the patron had not been disputed, and that the refusal to admit his presentee had been rested on grounds arising after it had been sustained. In this way

the provision of the statute is just and reasonable; because all such grounds must have arisen in the course of a proper ecclesiastical proceeding; and were properly left, therefore, to the adjudication of the courts ecclesiastical. Considered in this view, I confess I am unable to see how the decisions already referred to can be said to be inconsistent with this construction, or as proving that the statute itself had been abrogated by desuetude. In every one of these cases, the presbytery had objected to the title of the patron; and had proceeded, not properly on any objection to the presentee, but on an erroneous judgment of their own, on the civil right of patronage. It was most justly held, therefore, that this could be no bar to the civil court adjusting the civil interests of parties, according to justice; and it was consequently found that in these cases the patron's right of retaining the stipend, under 1592, was continued till a lawful presentee should be admitted. But I am not aware of any case whatever, previous to the present, in which this Court has been asked to interfere, where a presentee was rejected on grounds altogether apart from the validity of his presentation, and emerging in the course of the regular ecclesiastical proceedings with a view to his ordination.

This view alone might be sufficient for the decision of the present question; but there are many other things in the act 1592, besides its embodying the act 1567, which appear to me to shew very clearly that the very brief provision as to patronages which occurs at its close, must be understood as qualified, not only by the provisions of 1567, but by a reference to the known forms and order of proceeding in such matters, then established in practice, or as might be afterwards introduced by the church, and sanctioned by open and unchallenged usage in that department; and that the rights and privileges of the church, as acknowledged and acted upon for centuries, would be greatly narrowed indeed, if it should now be held that every thing was *ultra vires*, and indefensible usurpation, for which an express warrant was not to be found in the precise words of the act 1592, or other particular statute. The whole strain of the act, and many particular passages in it, as well as unbroken usage since its date, are altogether inconsistent with such a doctrine; and though very unwilling to trespass on your Lordships' indulgence, I must be allowed to refer to some of those passages which appear to me not to have yet received sufficient consideration; [and here his Lordship went over several passages in the act, and concluded, that they proved plainly,] 1st, That the jurisdiction and power of the General Assembly were not limited by any specification whatever, but left on a *general reference to the known and existing usage* of "the church now openlie and publicly professed in "this realm;" 2d, That it had a general power to make *ordinan-*

ces binding on all inferior judicatures ; and, 3d, To “ put ordour to *all matters* and causes ecclesiastical, according to the discipline of the kirk.”

The same general reference to existing usage, as the true measure and interpreter of these legislative enactments, is to be found in the act 1690, c. 5 ; which directs the General Assembly to take the necessary steps for redressing all evils in the church, “ according to the Custom and Practice of its presbyterian government throughout the kingdom,” while the subsequent act of 1690, c. 23, substantially leaves “ the calling and entry of ministers to be determined by the judgment of the presbyteries” without any special directions.

But the most important point, which arises upon the construction of the statutes relied on, is that already stated by Lord Fullerton, as to the effect of that remarkable provision in the leading section of the 10th of Anne, c. 12, by which, after providing that the right of *presentation* given to heritors and elders by 1690, c. 23, shall cease, and be restored to the former patrons, it declares, that the presbyteries shall be bound to admit and ordain the presentees of such patrons “ in the same manner as persons presented *before the making of this act* ought to have been admitted.” I confess it appears to me that these words are too plain to admit of construction. The pursuers say, indeed, that instead of “ *before the making of this act*,” we should read “ before the making of said act 1690, c. 23 ;” or rather, “ before the Restoration of Episcopacy, in 1661.” But this is evidently altogether extravagant ; nor is there any where, I believe, an example of such a perversion of clear and unambiguous expressions being suggested. But the manner in which presentees ought to have been admitted before the passing of the act 1711, could only be the manner in which they were directed to be admitted by the act 1690, c. 23, which was in force up to the moment of the making of that last act : And the inevitable conclusion is, that though the right of presentation was transferred (*eo nomine*) from the heritors and elders to the old patrons, they too were now to propose their presentee to the whole congregation, to be approved or disapproved ; and that in case of disapproval, the whole matter was to be ordered and concluded by the determination of the presbytery. I am aware that this construction has not been very distinctly maintained by the defenders ; and but very slightly considered, indeed, in the argument for the parties ; and we have been assured that it has not been acted upon or adopted in the practice of the church. But I am bound to take notice of the clear words, as they appear to me, of a British statute ; which cannot fall into desuetude, or lose any part of its au-

thority, by any opposite usage. It may be said, indeed, that this construction is inconsistent with the act of Assembly of 1834; and cannot consist with its validity. Even if it were, it would not in any degree obviate the objection to our Jurisdiction; the whole power being left to the church courts, on this interpretation, at least as much as on any other; and it would not in the least aid the actual argument of the pursuers on the merits, which rests entirely on the proposition, that no concurrence of the people, in any shape, is to be required, nor any thing interposed between the presentation and the literary trials of the presentee. But I think, that the construction in question is not substantially at variance with the act 1834. It is, no doubt, provided by the act 1690, that the disapprovers shall give in their reasons, to the effect that the presbytery may cognosce, not however on their reasonableness, but “on the affair” generally; and the whole “ordering of the admission” is left absolutely to their determination. At all events, it is quite plain that they were to be the final and exclusive judges of the reasons; and I must hold that they were entitled to find that it was reason enough for objecting to the reception of an individual as parish minister, that a majority of the congregation had solemnly declared that they could receive no edification from his ministry.

But however this may be, and coming back to the plain reference to established usage in the earlier enactments, I am of opinion that if it can be shewn that, according to all the acknowledged standards of the church, its ordinances and Books of Discipline, and also to the usage of the early Christian churches, constantly referred to in these authorities, it had always been held that no one could be intruded on a congregation contrary to their will; and that a certain concurrence of the people was required as indispensable before any candidate for such office could be ordained as their pastor, it will not be easy to hold that, under the general clauses to which I have referred, this must not be received as a qualification of the brief and general provision that presbyteries shall be bound to admit qualified presentees. *They are bound to admit them:* But only according to the established rules and open practice of the church; and they are entitled not only to judge of their qualifications for the holy office without appeal, but to fix what shall be the necessary qualifications.

I shall not go again into the history of the declarations against intrusion, and the necessity of concurrence, already so fully and ably discussed by Lord Moncrieff. I incline to think that this principle, though never renounced or abandoned, only took the form and the name of *a Call* after 1711: and I am very much satisfied upon that point, by the learned deductions of Lord Medwyn.

But I hold, 1st, That by the practice of 120 years, such a concurrence, and in that form, is now an indispensable part of the ecclesiastical procedure, towards ordaining and settling of a parish minister ; 2d, That the act 1834 is truly a mere regulation of that necessary procedure ; and, 3d, That all the proceedings subsequent to sustaining the presentation, are intended for the one purpose of ascertaining the qualifications or fitness of the presentee to be so ordained and settled in the congregation ; and are therefore within the exclusive province of the church, on the most rigorous construction of the statutes.

As to the argument, that calls are unnecessary, and that this is settled law by the recent practice of the church, I refer to the arguments of Lord Moncrieff. We see that so late as 1768, the Assembly itself repeatedly refused to go on where the call was insufficient ; and for long after, presbyteries and synods persisted familiarly in the same practice. I myself remember perfectly, having argued many cases upon this ground, at the bar of the General Assembly, I am confident within the last twenty-five years ; and on no occasion was the call sustained without the dissent of a respectable minority of that House. In no instance, either that I can recollect, was the appeal dismissed, as inconsistent with any settled law of the church : But each case was argued on its special circumstances ; and in the greater part, the list of express dissentients was canvassed and argued upon with much anxiety, as forming an important element in the decision.

When I consider, therefore, how much painful discussion and costly litigation took place for the better part of a century upon this very subject, of the sufficiency or insufficiency of *Calls*, and how many parishes were left vacant and destitute for a long course of years in consequence, I confess it is impossible for me to believe that it really was all this time, in the power of any one patron or presentee to come to *this Court* and maintain, as I understand the pursuers to do now, that the existence or sufficiency of a call was no necessary proceeding in the settlement,—but a mere idle or mischievous ceremony ; and that the presentee was fully entitled to go on without it. That such an argument was never started during all that time by any of those who had so clear an interest to maintain it, or by any of their learned advisers, is conclusive in my mind against the possibility of its soundness, opposed as it now is by the accumulated usage and settled opinion of all the intermediate period.

Such, however, is the ground now taken by the pursuers,—and I think by some at least of your Lordships ; and I am satisfied indeed, that if the pursuers do not go this length,—if they do not maintain that a call is a mere farce, for which there is no neces-

sity, and that it is *ultra vires* of the church courts to refuse to proceed with the trials of a presentee on account of the want or utter insufficiency of the call,—I do not see how they can possibly succeed in this action.

The act of 1834, is said, indeed, not to be an act upon calls, but an entire innovation upon the law of the church, and especially upon the ground, that though presbyteries were formerly left to *judge* for themselves as to the sufficiency or insufficiency of a call, they are now deprived of all judicial power, and reduced to mere ministerial registrars of an arbitrary procedure.

Now I am inclined, I confess, to take the word of both sides of the General Assembly for the propriety of the title they agreed to give to their act, however they might differ as to its policy ; and on looking into it, I am confirmed in the opinion that it has been rightly and correctly denominated. If the church courts were entitled to require a call, and to judge of its sufficiency in every particular case, I really do not see how it can be doubted that they must also be entitled to fix, by a general law or resolution, what it is which they require to make it sufficient. For the purpose of this case, I do not think it necessary to assert their Legislative power farther ; but to that extent I think it is altogether unquestionable. If they were fully prepared, as a supreme *Judicature*, to reject all calls which had not the subscriptions of at least one half of the heads of families, what incompetency could there be in their embodying this rule, as a *Legislature*, in a general enactment—to serve as a guide and direction to all inferior judicatures, and save the necessity of endless vexatious litigation ?

As to its precluding all exercise of *judgment* on the part of the presbytery, it truly does so no more, or otherwise, than as every rule for the forms of proceeding, or for settling the requisite amount of education or proficiency in particular cases, must always do. In 1567, and for long after, there was no course of academical attendance required in presentees ; and still less any settled rule as to what proofs of sufficiency were to be given by them ; and different presbyteries no doubt exercised an unlimited judicial discretion, in very different ways on the subject. Since those times, however, this large power of judging in those bodies, has been greatly abridged by successive acts of Assembly ; which no one has yet arraigned as taking away the judicial power of presbyteries ; though every one of them restricted this power, and reduced it in many respects to a mere power of reporting whether the requisites enjoined by the higher authorities had been complied with or not, whatever opinion the reporters might have as to their intrinsic reasonableness. But if this has been submitted to with-

out complaint, as to the far more important matters of the literary attainments of presentees, it is not easy to see what objection there can be to a similar limitation of the presbytery's original right of judging whether a call in his favour has been sufficiently subscribed or not. The act in question interferes with no other branch of their judicial power; and, in fact, merely furnishes them with a *canon of evidence*, by the application of which they are to be guided in all questions as to the sufficiency or insufficiency of calls. The substance and effect of the enactment plainly is, That the presentee shall have the benefit of a presumed call in his favour by all who do not come forward to intimate an express dissent; but that he shall be rejected, as on an insufficient call, if more than a half of the heads of families record their dissent; and offer to pledge themselves that it is given from a regard for their spiritual edification, and that of the parish, and on no other consideration. The question before the presbyteries, under the former form of the call, was never any thing more than whether it was sufficiently subscribed; and there were in different places, of course, different opinions as to what amount of subscription was requisite. All these discrepancies it was the province of the General Assembly to settle; and as uniformity in its decisions on such a matter was obviously very desirable, it was justly thought, that when *their* minds were maturely made up on the subject, and the matter sent on overture to the presbyteries, it was most fitting that the necessity of future disputes and appeals should be superseded, by the authoritative enactment of such a general canon of evidence as is embodied in this act. It must be observed, however, that the proceedings of the presbytery, though if regular, they must of course be in accordance with the act, are still *judicial* proceedings, and competent as such, to be appealed from to the synod or Assembly.

It seems to me, therefore, to be clear, that this is merely a *regulation* of the old established proceeding in a call; and that unless this Court could have found a *particular judgment* of the Assembly illegal, because it had rejected a call as insufficient for having the names of less than one-half of the heads of families annexed to it, it cannot consistently so deal with the judgment in question. *The amount* of concurrence required in either case has plainly nothing to do with the question of *competency* or legal power; and can only affect the very different question of the *justice* or wisdom with which the power has been exercised. If it would not have been *ultra vires* in the Assembly to have rejected a call because it had not a single signature, as little could it have been *ultra vires* (however palpably unreasonable) to have

passed an act declaring all calls insufficient which were not subscribed by at least nine-tenths of the congregation.

But though I should be induced, upon these grounds alone, and looking merely to the long unquestioned existence of Calls, as an indispensable step in the ecclesiastical order of settlements, to hold the act of the presbytery now in question as entirely within their power; I confess I rest this opinion with more satisfaction on the conviction at which I have now arrived, that the *acceptableness* of a presentee to the body of the parish, which this proceeding seems to test in an unexceptionable way, is truly to be regarded as one of the *qualifications* which the provisions of the very statutes referred to, leave exclusively to the judgment of the church. And this appears to me to be a view of the case not properly alternative, or at all inconsistent with the other, but truly cumulative and corroborative of the grounds on which the other might have been singly rested. The illegality of intrusion, and the necessity of a concurrence (latterly in the shape of a Call) to negative or exclude that hazard, are best explained and justified by holding, as I incline to hold, that the acceptableness of the proposed pastor was all along considered as one of the most indispensable *qualifications* which he could possess, for a happy and successful ministration among them in the offices of religion; and that, on this account, the trial of *this* qualification was appointed to proceed separately, and to take the lead of all the rest—thus forming the initiatory part of his whole appointed course of probation.

I am aware, it has been said, that the approbation or disapprobation of the parishioners proves only the state of *their* minds or feelings, but is no evidence of any personal qualities in the individual who is the object of them; and that it is an abuse of language therefore to reckon acceptableness as one of the *qualifications* which could have been in the view of the framers of the statutes, giving the church the sole power of judging of such qualifications. I cannot say, however, that I am much moved by this metaphysical or grammatical argument: a little more metaphysics indeed might, I think, have suggested the answer. The deliberate dislike of a great number of people, resting too on no idle prejudices, *must* necessarily have been produced by certain qualities or defects in the object of it; which are truly personal to him, and exist, independent of their effects; though without the effect it might not have been easy to produce proof of their existence. When witnesses concur in swearing that they would not believe a person on his oath, this is admitted to be such proof of his want of veracity as to exclude him from bearing testimony. Yet they only speak to an impression on their own minds—and in England at least, are not entitled to state any special facts to justify

that impression. His immoral character is inferred altogether from the effect it has produced on the minds of those who knew him : and surely when the majority of a parish solemnly declare that they could not receive edification from the ministration of a particular pastor, this is far better evidence of some *unfitness in him* for that particular charge, than the other is of habitual mendacity. The unfitness, it will be observed, is the result of personal qualities, *both* in the flock and in the pastor : and as to the former at least, no evidence can be so good as that of those who speak from inward consciousness. But even as to the presentee, the evidence, if sincere, is conclusive. The qualities or defects which it indicates may infer no moral reproach, or intellectual impeachment ; and they may often be such as to be incapable of being either distinctly stated or formally proved. They are merely *relative* to the condition of the people who are impressed by their effects ; and may resolve only into a deep sense of such utter unsuitableness as to leave no hope of comfort or profit from their proposed relation. The preacher may be orthodox, and learned, and eloquent : But he may be too rapid for the comprehension of a dull parish—too ornate for their rusticity—too erudite for their ignorance. The very gifts which would have made him the glory of an university, or the delight of a cultivated metropolis, may be disqualifications for a congregation of incurious rustics. If Dr. Clarke had preached his great sermons on the *a priori* argument for the existence of a Deity at Auchterarder, or Dr. Parr some of his learned discourses on the first verses of St. John, I think the congregation would have been well entitled to say that they could receive no benefit from such lofty ministrations. But there may be many other most solid grounds for such a conviction. The preacher may pronounce his words too finely to be intelligible in a provincial district. He may be surly and repulsive in his manners—or too brisk and airy to suit their gravity—or too cold and reserved to invite their confidence, or give promise of any comfort in an intercourse which ought to be endearing. None of these things could well be stated as specific objections ; or very well proved, otherwise than by the testimony of those who were conscious of their effects on themselves. But can it be doubted that they are serious disqualifications ? and that the least of them is far more likely to unfit the pastor for the successful discharge of his duties, than a little less Hebrew or church history than may have been required by his learned and reverend examiners ? For the latter deficiency he is rejected without right of appeal to any civil tribunal ; but the former, it is said, is not to be regarded as a deficiency at all ; and the solemn declaration of three-fourths of the congregation that they can receive no edi-

fication from his ministry is held to be no evidence of any unfitness in him for the charge. It has been said, that this right of dissenting will be often abused. But I confess I have the strongest conviction, that where our Scottish heads of families thus come forward to record their dissents, under the sanction of such a declaration, their proceeding will generally be found to rest upon reasons at least as strong as any I have stated : And since it is admitted that the church-courts have the power of rejecting for unfitness, not generally for the office of the ministry, but unfitness for the particular parish in contemplation, I have great difficulty in imagining what better evidence can generally be given of such unfitness, than is furnished by such dissents and declarations. Lord Medwyn, I think stated, and most correctly, that a presbytery may unquestionably refuse to loose a minister already settled in one charge, who has received a presentation to a better living, and thus disappoint both him and his patron, if they are satisfied in their own minds that he is more useful and acceptable where he is, than he is likely to be where it is proposed that he should go. But if a mere surmise or anticipation of comparative unacceptableness is a reason for rejecting a presentee in such a case, why should not the complete proof of its actual existence, and to a most formidable extent, warrant a similar rejection in a case like the present ?

Again, it has been argued, that the acceptableness, (or the causes of the acceptableness) of a presentee, cannot be considered as qualities personal to him, because the procedure by which this is tested precedes what are properly called *his trials* ; by which alone it is said his qualifications can be ascertained ; and one great ground of complaint in this case has always been, that Mr. Young has been rejected without any trial whatever having been taken of his qualifications. But this appears to me to be a mere verbal subtlety. The trials technically so called are indisputably but a part of the trials to which all presentees are liable. They include only trial of his scholarship, orthodoxy, and literary attainments. They do not include the more serious part of his *moral* probation, which is reserved for the service of his Edict, before ordination. These therefore are at all events but a part of his trials ; and as that of his moral purity may come after, with the Edict, so that of his having the gifts which render him not unacceptable to his flock, may go before, with the Call ; and such accordingly I take it, as is the old established order of his whole course of probation. After his presentation is sustained, all that the church courts have to do is to ascertain, in their strict ecclesiastical capacity, his fitness to be ordained as

minister of that parish ; and they have full powers, I think, to ascertain this in every material particular. Their whole proceedings are directed to this object ; and every one step of them is as plainly intended for this purpose as every other. It is a spiritual relation which is about to be established between him and the congregation ; and the first step, therefore, is to ascertain whether they are willing to enter into it, or feel such a repugnance, as makes it plainly impossible for the presbytery conscientiously to sanction its completion ; and for this purpose is the Call ; now rendered more efficient by the regulations of 1834. Then come the trials of literature, soundness of doctrine, and intellect ; and last the ordeal of the Edict, for the purgation of any moral impurities. But the whole is one unbroken course of *trials* ; and all directly calculated to ascertain the single point of *the fitness* of the individual for the charge on which he proposes to enter.

I had noted some other remarks bearing upon this view of the question ; but I will not go farther into it. Your Lordships will understand that I think the law of 1834, and the proceedings under it, are not *ultra vires* of the church, 1st, Because they amounted only to such modifications of the Call as were plainly within their competency ; and that the sustaining the sufficiency of a Call is a necessary preliminary to any valid ordination ; and, 2d, Because I think the qualities in the presentee, which, though not specified, or separately proved, draw on him the deliberate and conscientious dissents of a majority of the congregation, are truly disqualifications, on which the presbytery is entitled to decide, in the very terms of the statutes relied on.

Before concluding, I wish to say a word on the objections to the summons so forcibly stated by Lords Fullerton and Moncreiff. It is no doubt quite true, as observed by the latter, that the cause has been argued much more as if we had been in a reduction of the act of Assembly 1834, than in a declarator against the presbytery of Auchterarder, proceeding on a summons in which the existence of that act is not once recognised. At the same time, I am not prepared absolutely to concur in the conclusion, that it was therefore incompetent for the pursuers to go into the merits of that act, and to dispute its validity in their action with the presbytery. The presbytery alone had rejected the presentee, and were necessary parties to the action. If what they did was truly illegal and injurious, the warrant, or even the order of a superior, would not take away their responsibility ; and when this warrant was brought into notice, I rather think it was competent to discuss its legality without making its original authors parties to the suit. But at the same time I agree that the entire omission of all notice of it in the summons, and the fact of the

pursuers proceeding as if the act complained of had originated with, and been spontaneous on the part of the presbytery, was, in my view of it, a suspicious and improper proceeding. But on the other hand, I have a very firm opinion as to the entire justice of the other objection, so fully and ably explained by Lord Fullerton, that the question as to the legality of the act 1834 truly is not raised *under this summons and record*; and that the only question properly before us on these, is, Whether the presentee was not entitled to be taken on trials *per saltum*, and at once, after his presentation had been sustained; and whether it was competent for the presbytery to interpose any form of proceeding whatever, between the presentation and the trials? Thus negating all right on their part to require a *Call*, or a deliverance thereon, and demanding judgment on the broad general ground, that the *concurrence* of the people, in any form, or to any extent, is not in any respect necessary, and cannot be required in any case where the presentee asks to be examined without it. I am satisfied that *this* is truly *the only* question which is raised on the pleas in law for the pursuers on this record; and therefore I am of opinion that, even if I could have concurred with the majority of your Lordships on the merits, I should have thought it incompetent to discern in the terms of this declarator, unless I had also been prepared to say that no call or concurrence of any sort was necessary.

I have said nothing of the peculiar importance of this case; But I can assure your Lordships that I feel it as deeply as any of your number. But we must decide without regard to consequences; and I do what I can to turn away from their consideration: For I grieve to say that I thoroughly participate in the painful conviction which was expressed, I think by Lord Meadowbank, that whatever decision we may give on this question, the effects are likely to be unfortunate. It is certainly my impression, that the risk and the evil would be less, if decided as I would decide it. At the same time I am bound to say, that if I thought such a decision likely to lead to the introduction of a system of popular election of ministers, I should not be of that opinion; having the strongest possible conviction that no dissensions in the church, no risk of farther secession from her pale, no prospect even of recurring and more distressing conflicts between the civil and the ecclesiastical authorities, (which are the evils I fear from the decision to which I am opposed,) would be so injurious to the peace and honour of the church, and to what is far more important, the religious and moral welfare of the people, as the concession of that fatal boon for which so many are, as I think, so ignorantly, contending. These issues, however, must be left to

Providence ; and we have nothing to do but fearlessly to discharge our precise and limited duty.

I am for dismissing the declaratory conclusions as incompetent ; and finding, *separatim*, that the act of Assembly 1834, and the proceedings of the presbytery in the execution of it, were not illegal, or *ultra vires* of these ecclesiastical authorities.

Wednesday, March 7.

THE LORD PRESIDENT—"LORD COCKBURN."

LORD COCKBURN.—MY LORD—Before proceeding to consider the more general and important question that is before us, I have to express my concurrence, on two special points, with what has been said by some of your Lordships, and particularly by Lord Moncreiff. These points are, that the pursuers are barred by acquiescence from making their present demand; and that the record is not constructed in such a way as to justify the Court in deciding on the only question that has been argued. I think both of these objections well founded. I am aware that the defenders have no plea upon the acquiescence; but there is a statutory remedy for this, which I think ought to be applied. The record, especially when considered in reference to the only conclusion now before us, instead of correctly bringing out the point really meant to be tried, is framed so as to hide it; and to compel us to give a judgment on an abstract proposition, which, taken, as it must be, by itself, the pursuers have no proved interest to maintain.

The case upon which, it seems, it was intended to obtain our judgment, and which we must take up as disclosed in the course of the discussion, is by far the most important that this Court has ever been required to determine. Its *decision* involves the future condition, perhaps the existence, of church-patronage in this country. Its *principles* involve still more. They involve the subsistence of the General Assembly as a supreme and independent ecclesiastical authority. Deeply affecting these things, the case includes the subjects which, for the longest period, have been the most important to the feelings, the rights, and the interests, of the people.

We have nothing to do here with views of expediency. The

weight of our judgment with the public must diminish in proportion as it shall appear that such considerations tended to produce it. Separating my own mind from them entirely, my opinion is—*First*, That in doing what the Court is now asked to condemn, the defenders were acting in a character, and in relation to a matter, in which, *even though they were wrong*, this Court has no jurisdiction to set them right; *secondly*, That, though the Court had jurisdiction, and was entitled to review their proceedings, what they did was legal, and that, therefore, the pursuers are not entitled to any redress, and least of all to the redress which they now seek.

Having stated the fact that this is my opinion, I wish I could stop; for I am conscious that I have not a word to say which has not been said better already. But it is proper that the views of each of us should be distinctly known. I shall run over the grounds of mine as rapidly as I can. My judgment rests upon very humble ground. The results which I have come to are forced upon me by what I find in one or two acts of the Scottish Parliament—upon a Scotch subject,—explained by Scotch practice.

After many struggles, and a strong aversion on the part of the people, and a wholesome jealousy, natural to presbytery, on the part of the Church, patronage was at last definitively fixed as the law in 1711; and it has been practically enforced since about the year 1750. But there never was a time at which it was not seen, and acted upon, that patronage, if unchecked, must necessarily be dangerous; and, accordingly, the law never tolerated it without interposing the barrier of the Church between the people and the patron. It left him his trust; but it armed the Church with strong powers to control him in its exercise; and the question as to the legality of the interference of the civil court is solved as soon as it is ascertained what these powers are.

I acknowledge the great principle that the Church, as an establishment, has no power but what the State has conferred upon it. But I cannot infer from this, that all power is to be withheld from the Church for which no express clause can be produced in any act of Parliament. Scarcely any old institution could stand upon this rule for a single hour. When the Legislature adopted Presbytery, it did so in reference to pre-existing ecclesiastical principles; just as when Episcopacy took the place of Catholicism, it carried along with it, and retained, the known and established rules of the old church, in so far as they were capable of being transferred to the new one. In establishing Presbytery, the Parliament of Scotland did not proceed to manufacture a system entirely new in all its details, as if there had never been a church before, but built upon the old ecclesiastical foundations. We are not, therefore, to expect that its privileges were imparted to the

Church, or its duties imposed upon it, by precise modern definition. They were given in a few words; the full import of which it has been the work of centuries to evolve.

Thus the act 1592, 116, which has been justly styled *the Great Charter of Presbytery*, without defining its words, and assuming that the people understood the phraseology, and the things, which had long agitated them, first ratifies "the libertie of the trew kirk," and confirms its government by sessions, presbyteries, synods, and assemblies; and then indicates—for it is an indication, and no detailed description—the powers of each. The presbyteries are authorized to "*make constitutions* which concerns *To Prepon* in the kirk, for a decent ordour in the particular kirk where they govern;" for which purpose "they have power and jurisdiction in their own congregations in matters ecclesiastical." "Synods have power to handle, ordour, and redresse all things omitted or done amiss in the particular assemblies." The General Assembly is empowered "*to make ordinances*;" and, through its presbyteries, the Church in general is "*to put ordour to all maters and causes ecclesiastical* within their boundes." And to enable them to do so, there is a confirmation "of the privilege that God has given to the spiritual office-bearers of the kirk concerning *heads of religion*, maters of heresie, excommunication, *collation*, or *de-function* of ministers." And the only rule given for the guidance or the limitation of these powers, is, that they are always to proceed "*according to the discipline of the kirk*." But these spiritual office-bearers are not instructed as to the modes in which this discipline is to be regulated. These are left to the Church itself. The statutes contain no church form of process.

Other statutes repeat this grant by the State to the Church of these general powers; all the statutes of the age recognise it; and there is no act of Parliament which impairs it in any one point. Nor are these powers given merely for the time, or to be exercised once, and then held exhausted. They are given prospectively and permanently; to be used as circumstances may require. Their objects and limits are not expressed with the verbosity of a modern statute; but what they were understood to import has been wrought out and sanctioned by time.

The practice that has followed shews, that, besides every necessary power of internal regulation given to each of the ecclesiastical bodies, large legislative authority was conferred upon the supreme one. Of course I do not use the word Legislative as denoting any thing equal, or analogous, or repugnant, to the legislation of Parliament. I use it as denoting *this* power, viz. that whenever a matter is within the peculiar jurisdiction of the Church, so that it could dispose of it at any time it occurred by a separate determi-

nation, then the Church is entitled to embody its opinion in the form of a prospective rule, which it can compel all its members to obey. Its right to exercise *this* legislation, that is, to regulate the internal polity of the Church by acts of the General Assembly, is indisputable and indispensable. Without this authority, and largely exercised, the Church must have been wrecked a hundred times; and there are very few years, even of its modern existence, in which it would not be aground were this privilege to be denied it. Without laws made under the permission of the State by itself, the Church could not have defined the limits and duties of its own component parts, the Assembly itself included; it could not now educate a single student, or license a single probationer, or admit or remove a single minister, or preserve the subordination and discipline of its system for an hour. The Barrier Act, which has now been acted upon for 140 years, and requires the consent of a majority of all the presbyteries of the Church to any new law, is of itself a public acknowledgment of the Church's legislative powers. By the constant exercise of these powers on every proper clerical subject, has the Assembly suited the Church to the necessities of different eras; and if it were now to be discovered that all this was usurpation, and that wherever any atom of civil interest was indirectly affected, the Assembly's legislation ceased, the Church must instantly fall to pieces.

In estimating the powers of the Church, therefore, we are not to look merely at the few statutory words which form its ancient source, but at that great body of common law and of legislative regulation which the long legal exercise of this power has accumulated.

Keeping this in view, the great general principle which saves parishes from being altogether given up to the patrons, is, that while the latter confers, by his presentation, the civil title to the benefice, the collation, which imparts the title to the spiritual office, is the right and the duty of the former exclusively. This power of collation, by which I mean the whole process of examination and admission, rests on no clerical encroachment, but is the express gift of the State. The act 1567, 7, enacts, "that the examination and admission of ministers within this realme be *only* in the power of the kirk." The act 1592, 116, appoints all presentations to be directed to presbyteries, "with full power to give collation thereon." I do not understand even the pursuers to contest the declaration of the Church in 1565, that, "as the presentation unto the benefice appertains to the patron, so the collation by law belongs to the Church; and the Church should not be defrauded of the collation no more than the patrons of their presentation."

Now in 1834 the Assembly passed an act regulating a particular part of the process of collation. Its substance is, that,—in conformity with a fundamental principle of the Church against the intrusion of pastors,—presbyteries, *giving patrons the benefit of its being held that all who do not object shall be dealt with as assenting*, shall reject presentees against whose admission there is an express dissent by a certain description of persons. The presbytery of Auchterarder obeyed this direction of its ecclesiastical superiors, and could not have disobeyed it without exposing itself to ecclesiastical consequences which no civil court could have averted. And what is now demanded?

The Court is not asked directly to determine any matter of patrimonial interest. None such is raised in the only conclusion now before us. It has been intimated that such matter is in prospect. But it is not contained in the only conclusion that has hitherto been argued. The pursuers restrict their claim, and therefore both parties restricted the discussion, solely to the first declaratory conclusion; which, therefore, we must look at strictly by itself.

Now, the substance of what the pursuers wish is, not merely that your Lordships should pronounce the obedience of the Presbytery to have been illegal, but *should prescribe to the Presbytery, acting in the matter of collation, what it is to do hereafter*. They do not ask us to order the Presbytery to sustain the call; but they ask us to order it to do that which, in their sense, cannot be done till the call be sustained, viz. to take the presentee upon what they term his trials. The defenders maintain that they have, in the proper sense, tried him on the only qualification which it is competent to try before sustaining the call, and have found him deficient. But the pursuers, *putting their own construction on the words trial, examination, and qualification*, insist that your Lordships shall virtually ordain the presbytery to *recall its sentence*, and to try him over again in what they term “due and “competent form;” and that if he be found qualified, in the sense in which they use this word, the presbytery shall, *on the order of the civil court, give induction*. The essence of the demand is, that the Church, contrary to its own view of its spiritual duty, in this spiritual matter, shall induct by the order of the civil court. And if it be supposed that the patrimonial interests which are beyond this conclusion, must, though not argued, be taken into view, still, as this summons is constructed, *it is only through this declaratory conclusion* that these remote interests can be reached. The patrimonial conclusions follow on “*its being so found*,” that is, on its being first found, that *in the matter of pure collation*, it is competent to this Court, not only to declare that the Church has

gone wrong, but to instruct it in the way in which it is hereafter to proceed.

I am humbly of opinion that this is the very case for which the statute 1567 provides, and that the only remedy is by an appeal to the higher Church Courts: Whether the patron's *right to the vacant stipend* must cease with the judgment of the Assembly, is a civil question competent to this Court. But the spiritual cause must "take end as the Assembly shall decern and declare." This remedy may be insufficient, or not exclusive of others; but the question is, Can *this Court* give a better? I think not. And this opinion is forced upon me as the necessary result of the mere fact that the collation, *with all its forms and rules*, has been devolved by the State upon the Church.

In the course of every collation there are two things on which the Church must be satisfied; one is, that the presentee is adequately called, the other that he is qualified.

However instructive, it does not appear to me to be necessary for the decision of this cause, that the exact history and theory of the call, or the different meanings which the term has had at different times, should be accurately understood. I think it fully demonstrated, that, from very remote ages, there has generally been some reference to the parishioners before the spiritual relation of pastor and of flock could be constituted; and it is to the *fact* of the adoption of this principle into the Scotch Church that I refer in talking of the call. The *word* is immaterial. The *thing* meant by it in this country was accurately enough described by Dr Robertson, who used to term it "The *concurrence* of the people in "the moderation of a call." Whatever sorts or degrees of right, or of influence, it has been held to imply, at different times, I conceive it to be certain that this principle, of consulting the people, or of letting them convey their feelings, has, past all memory, prevailed in the Church of Scotland, insomuch that the ecclesiastical act termed the Moderation in a Call, has become a fixed and indispensable step in collation; and that the practical use to which it has been turned, is to give the parishioners a legitimate and convenient opportunity of expressing their willingness to receive the proposed minister. I cannot discover an accurately known period of our history in which some such call has not prevailed. I could not have been more surprised on being told that presbytery was not the church of this country, than I have been by learning that calls, except as forms, are no part of our presbytery. They seem to me to be absolutely imbedded in the constitution and in the practice of the church.

The Solicitor-General quoted some strong instances from the proceedings of the Assembly for several years after the final esta-

blishment of Presbytery in 1711, to shew how efficaciously calls were then enforced. Lord Moncreiff explained how these examples were succeeded by the cases of Cromarty, St Ninians, Glendovan, Currie, and other parishes, all shewing that it never was the feeling that the call was not a real and practical thing.

No doubt, there came a period during which, under Principal Robertson's guidance, its efficacy was relaxed. Those who, in his day, had the wisdom to enforce the law of patronage, had also the weakness to imagine that they supported patronage, when they repressed every popular claim by which its abuses might be checked; and, therefore, they repressed the call. It may have been wise in them to do so; but, though the Assemblies of that day made it as insignificant as they could, they saw that circumstances might change, and they never attempted to anticipate and exhaust the future legislation of their successors. They never abolished it in practice, and never even attempted to strike it out of the system. All that they did was, that exercising their own discretion in their own day, they tried to make the call, *so long as it was administered by them*, insignificant. But they still left it to be stated as a fact at this hour, that, for the last 150 years or thereby, not a single clergyman has been admitted into a church without a call given by the people, accepted by the presentee, and approved of by the presbytery. Accordingly, in 1782, being only one year after Principal Robertson, who had long guided the Assembly in these councils, had retired, and when his principles were in full force, the act was passed, which declares "that the moderation of a call in the settlement of ministers, is agreeable to the immemorial and constitutional practice of this church, and ought to be continued."

Principal Hill succeeded Dr Robertson as the leader of the church for the next thirty years. He and his followers adhered to this as the law, but they, likewise, chose to be satisfied with a nominal enforcement of it. "But though," he states in his Theological Institutes, that "it is *now* understood that a call *may* be sustained, however small the number of subscribers," he never insinuates that it *must* be so. His whole doctrine, and the whole tenor of his public life, shewed that he would have been the very last person who would have limited the supremacy of future Assemblies in regulating all such matters according to circumstances. He, like his distinguished predecessor, very probably believed that the system they had reared was too perfect ever to require revision; but no one sentence that either of them ever wrote or spoke can be produced, to indicate that they believed or wished that they had permanently impaired the power of the church, so as to subject it, if change should become expedient, to the control of the civil authority.

I am aware of the respect due to a course of decisions; but surely, the extent of this respect is liable to be measured by the Court that pronounced and that applies them. Suppose that the Assemblies we have been referring to, instead of constantly shocking the minority, by supporting nominal calls, had been contented by requiring only a certain per-centage of the parishioners to concur, could it have been seriously maintained that the Church was thereby put under a permanent disability to alter that per-centage. It has been argued that this right of altering the rules is inconsistent with the oath taken by each Sovereign at his accession to maintain our church, because the church must be taken as at the date of the oath, and kept there, since the king never consents to these changes. So that, because George the Third found the church in a certain condition when he came to the throne in 1760, all the laws introduced between that and the year 1820, when his Majesty died, including the whole reigns of Principal Robertson and Principal Hill, are frauds upon the royal oath. If the decisions of these Assemblies be binding for ever, the church need rely no longer on its Barrier Act; for new laws may be introduced irreversibly, without the consent of a single presbytery, provided that the managers of a few Assemblies have only the skill to introduce them in the form of decisions on private causes.

It was most justly observed by Lord Fullerton, that the real understanding of the Church as to this matter even in the time of Principal Hill, was evinced by the way in which the Assembly dealt with actual cases on the call. Lord Jeffrey will probably recollect, as well as I do, that we were for a long while in the practice of arguing these cases at the bar of the Assembly, when we had the honour of being opposed by Principal Hill himself. But we were never told, when insisting that a call was paltrily subscribed, that what we were saying was *irrelevant*, and that the piece of paper was enough. On the contrary, the number of lawful signatures was first ascertained, after deducting those not in the parish, or children, or whose handwriting was disputed, &c.; and, then, the sufficiency of the call was discussed and voted in the house, in reference to the whole circumstances of the case. And how is it, if a call be a mere name, that he who procures a single signature to it by money will be convicted of simony?

Now, the only inference which I deduce from all this is, that calls, being part of the process of collation, are under the exclusive jurisdiction and control of the church. The extent to which they are so, may be seen in one fact, which is, that in granting constitutions to chapels of ease, the Assembly very frequently, if not always, arranges that the actual election of the minister shall be left to the congregation, or to those representing it; and in this case,

the people having obtained an enlarged right, the call is dispensed with altogether. But it is dispensed with *solely by the Church*, as the absolute master of the whole matter. If the Church can dispense with calls, it can enforce them.

And if it be so, the inference, that the Church in making regulations for the government of calls, is not liable to be controlled by the civil court, *in the matter of induction*, is, to my mind, irresistible. The whole thing is purely spiritual. Your Lordships may look into this matter, though spiritual, as into any other matter, *in so far as is necessary for the disposal of a civil interest*. But there is no civil interest at stake in this first conclusion; or assuming that there is, the demand is, that this civil interest, whatever it be, shall be reached by your Lordships *controlling the Church in the induction itself*; and particularly in that part of it which consists of the call. Let the Church be ever so wrong in what it has done, I have no idea that this Court has the power to give redress by taking the admission out of the hands of the Church; or by making the Church, *in the admission*, a mere instrument in the hands of this Court.

But is this what the pursuers' principles imply. They imply that it is competent to this Court to direct the Church to induct *without sustaining a call*. Or, if it be not so, they imply that your Lordships can inform the Church what call is to be held sufficient; for if you can prevent the Church from rejecting when there is an opposition by a majority, you of course must be entitled to decide what other proportion will do. It seems, moreover, that we can abolish the call altogether, or, at least, that we can declare that the Church has done so, although the General Assembly, backed by a majority of presbyteries, appears by an act and declares the very reverse. Nay, it seems that, though compelled to acknowledge the existence of the call, we can ordain the Church to act on the principle, that it is a mere *mockery*! No fact in the whole of this discussion makes so deep an impression on my mind, as its being thus openly avowed that the extinction, or degradation, of one of the oldest and most convenient usages in the process of induction, is the necessary consequence of granting what the pursuers claim.

The case as to the *qualification* seems to me to stand in nearly the same situation. The pursuers don't deny that the Church is, by statute, the sole judge of this; but they maintain that the word qualification includes nothing except the literature, morals, and doctrine of the presentee. But I know no authority for restricting it to these three things, or to any such like things. Even with regard to the personal qualities of the man, there is no enumeration in any act of Parliament of what shall be required. All this

is left entirely to the Church; the only rule given is, that the Church must be satisfied. But it seems to me to be a very great mistake to suppose that, in making up its mind, the Church is not entitled to look beyond the personal qualities of the individual, *taken by himself*. The duty devolved upon it is to ascertain whether he be *fit for the particular cure*. The statute 1581, 102, imposes this limitation on the rights of patrons, that they must present "in favour of *able and qualified ministers, apt and able to enter into that function, and to discharge the duty thereof*." The act of Assembly, 1638, shews what was meant by this; because it declares that "*men may be found meet for some places who are not meet for others*;" and it directs presentees to be examined with reference to this circumstance, a circumstance entirely external to the individual. Another act of the Assembly, in 1711, informs "the heritors, elders, heads of families, or persons of good reputation in the parish," that, under the law, as it is, they are entitled to object "against the person to be settled, as to his orthodoxy, literature, life, and conversation, or *other ministerial qualification*." But, indeed, there needs no other authority beyond the mere words of all presentations. The act in question only requires the presbytery to induct Mr Young, after "having found him *fit and qualified for the function of the ministry at the said Church of Auchterarder*."

Now, I cannot understand how the fitness of a candidate for a particular office is to be ascertained, unless the office be considered as well as the man. No conclusion can even be formed by merely looking at the life, education, or orthodoxy, of the individual. The whole parochial circumstances must be taken into view at the same time.

Of these, there is none more essential, or that has been longer recognised, than the fact of the presentee's being acceptable or unacceptable to the parish. The mode in which the fact may be ascertained, or the effect to be given to it, are different matters, of which I don't speak at present. But can it be maintained, that in judging of the fitness, or, as it is often termed, the "*meekness*" of any presentee for any cure, the fact of his being disliked by the people, or beloved by them, is altogether *irrelevant*? And that if his learning, morals, and doctrine, be sound, the presbytery's powers are at an end, and that that body is thenceforth reduced to the condition of a mere machine for inducting,—and a machine which it is in the power of a civil court to put in motion? I hold it to be the right and the duty of the presbytery to be satisfied on every fair element of qualification, and that there is no element so important as the existence or non-existence of that circumstance in the pre-

sentee, or of that feeling in the people, which evinces, or must probably produce, rooted aversion between them.

Accordingly, the right of the presbytery to consider this, and of the parishioners to state it, has been always admitted by our leading ecclesiastical lawyers on both sides of the church.

The late Sir Henry Moncreiff was lost to the Church before this question arose. But though the pursuers have selected a few detached passages from his view of the Constitution of the Church as favourable to them, it is impossible for me to read the whole work, without feeling that the idea of a patron being entitled to demand that the presbytery shall not consider the fact of unacceptableness, and decide, under the direction of their superiors, both as to the mode, and the time, of learning it, and as to the effect to be given to it, is repugnant to all his doctrine, and to the whole tendency of his mind. He states that "there are certainly examples in which the *magis bonum ecclesiæ, quite independent of the moral and literary qualifications of the individual presentees*, had determined the Assembly to refuse their induction; or in which the Assembly had set aside presentees as disqualified for their particular charges to which they had been presented, on grounds quite independent both of their knowledge and morals." He states the case of Currie, in 1740, as one example of this. No doubt there were circumstances which made the presentee there very unpopular; but still there was no objection to him *for cause shewn*, and the Church had nothing to proceed on, except the "*difficulties attending his call*," as the Assembly expresses it, or as Sir Harry states it, "the general opposition made to him in the parish;" and on this circumstance alone he was rejected.

There is another witness (I refer to him in no other character), who has been mentioned, and whose testimony is the more important, from its appearing that he took the lead in resisting the act of Assembly of 1834. The Rev. Dr Cooke states (in his speech in the Assembly in May 1833, on a much stronger act than the one before us, proposed by Dr Chalmers, p. 13) that "the extent or the nature of the qualification *is not limited*; nothing is said which implies it relates merely to learning, or moral character, or doctrine." He afterwards quotes the declaration of the Assembly in 1638, and adds (p. 15), "These enactments evince that the Church regarded qualification as including under it much more than learning, character, or sound doctrine; that it was the duty of presbyteries to ascertain the *fitness in all respects* of presentees for particular situations, and *that it was incumbent on them, where this fitness did not exist, to delay the induction, or to prevent it altogether*." In reference to the practice, he very candidly condemns the system long pursued by the

side of the Church he belongs to ; saying, " I am ready, however, to admit, that though the Church had all the power for which I contend, it has for a considerable period greatly abridged the exercise of it,—confining qualification within too strict limits ; and that it has often been maintained, that if presentees have such intellectual and moral qualifications, as procured them a license, they may, as a matter of civil right, demand induction into the benefice to which they are presented. *There is no enactment either of Church and State, which gives the slightest sanction to this doctrine ;*" (p. 17.) In his evidence before the Committee of the House of Commons (p. 341), he repeats this statement, explaining that *every thing* touching the general fitness of the man for the place, falls under the trial of his qualifications ; that therefore the people may object every thing, and that "*we are all agreed upon that ;* the sole difference of opinion was in the debate upon the call, *how* the congregation should be authorized to object, and *what should be the effect* of their interposition." Accordingly, in conformity with these views, Dr Cooke himself brought forward an overture in the Assembly in 1833, not introducing a new law, but declaratory of the existing law, to the effect, that it was "competent for the *heads of families* in full and regular communion with the church, to give in to the presbytery objections, of *whatever nature*, against the presentee."

The pursuers themselves don't seem to me to differ from this. They admit that the qualification is entirely a matter for the presbytery ; but they deny that acceptableness is any part of qualification, and say that the presbytery at least ascertained it in the present case, in a wrong way, and should not have given conclusive effect to it. Now these may be all very proper topics for the General Assembly ; but I cannot see that they are so for this Court. If being qualified, means being fit for the special cure, and likely to discharge its practical duties, repugnance between the presentee and the parishioners, *must* fall within the presbytery's cognizance in ascertaining the qualification. And if this be the case, what has this Court to do with the forms of proceeding, by which the Church tries the fact, or with the weight it gives it ? We might just as well be asked to control the Church in the forms by which it tries to ascertain delinquency with a view to the extrusion of a member, or in its holding this delinquency to be fatal.

In short, the moment that it is fixed that the sustaining or the rejecting of calls or of qualifications, are parts of the general process of admission, then it humbly appears to me to be, *eo ipso*, fixed, that the whole matter, *in so far as the admission is sought to be affected as in itself a substantive object of decision*, is withdrawn from our jurisdiction. I think we have just as much juris-

diction (but no more) to dictate to the Church what shall be held a sufficient call, or who shall be held to be qualified, as to what extent, or in what way, presbyteries shall inquire into presentees' knowledge of the classics.

It was argued that the presbytery failed to perform its duty,—that every such failure is a civil wrong,—and that for every civil wrong this Court can give redress. I demur both to the fact and the reasoning. I think that the presbytery *did* perform its duty. But assuming that it did not, where is the principle on which it can be deduced, merely from this circumstance, that the Court of Session is not only entitled to interfere, but to interfere by making the *Church act in a particular way in the matter of collation*? If the Court of Justiciary were either to administer its criminal law illegally, or were to refuse to administer it to all, what redress could your Lordships give? You might possibly redress some civil part of the wrong, as it is admitted that you may do here; but could you do so *by compelling the criminal court to proceed, and to proceed in the way you thought right, with its peculiar criminal jurisdiction*?

I conceive the pursuers to have completely failed in shewing any decided case warranting what they claim. In every one of the cases of Culross, Dunse, Lanark, Auchtermuchtie, and Kiltarlity, it was the patronage, or the temporalities of the benefice, that formed the subject of dispute; and in none of them was it proposed to affect the temporalities, as it is here, *by controlling the induction*. The two cases of Auchtermuchty and of Dunse bring out the true principle fully and clearly. In Auchtermuchty (14th February 1735) what was found was, “that the right to a stipend” is a civil right, and THEREFORE that the Court have a power to “cognosce and determine upon the legality of the admission of ministers AD HUNC EFFECTUM, whether the person admitted shall have a right to the stipend or not.” The Court did not go the least beyond the strictly patrimonial matter; and even this, it did not attempt to reach by prescribing to the Church whether, or how, it was to induct. This last step was urged upon the Court in the subsequent case of Dunse (25th February 1749); and though not formally stated in an interlocutor, as the *principles* of decisions seldom are, it is reported by Lord Monboddo, an accurate and learned observer of the proceedings of the Court, that there were two things “which the Lords did not meddle with.” One of these was, “that the presbytery ought to be discharged to moderate a call at large, or settle any other man; because *that was interfering with the power of ordination, or the internal policy of the church; with which the Lords thought that they had nothing to do.*” I cannot distinguish this from the present

case. And the operation of the same principle is discernible in the case of *M'Culloch v. Allan*, 26th November 1793, where a presbytery having found a schoolmaster *qualified*, your Lordship's predecessors found that an appeal lay to the Court of Session ; but the House of Lords reversed the judgment, expressly on the ground that the examination of schoolmasters *being a purely ecclesiastical act*, the only power of review was in the higher church courts. The Faculty report of the case of Dundas, 15th May 1795 makes the Court decern "*in terms of the libel.*" But this, as stated by Bell in his report (folio, p. 169), and as proved by the record, is a mistake. The Court only decided in terms of the *declaratory* conclusions ; " which conclusions were, that the presbytery, which had *illegally rejected a presentation*, should give "*due obedience*" to it "*according to the rules of the Church.*" What these were, is not attempted to be decided or considered ; nor is there the very slightest indication that the Court held itself warranted to instruct the presbytery as to the course of proceeding by which its duty of collating was to be performed.

I can make no application whatever of the powers of the Court in controlling corporations in the admission of candidates, to this question. Because, in the *first* place, I really do not think that the Church of Scotland is a mere corporation ; and in the *second* place, though it were, it would be a corporation on which the law has imposed the duty of declaring the qualifications of its new members, and the forms of admitting them, *to the exclusion of all other powers*, and particularly to the jealous exclusion of the civil power.

Nor can I be moved by certain extreme cases that are put, and which only involve the same principle that is involved in the case before us ; such as, the case that the Church should attempt to *depose* ministers when they became unpopular. I am of opinion, that let the Church depose for what reason soever, even the most absurd we can fancy, this Court could neither prevent nor repair *that act*. It might give the temporalities to the deposed man ; as, for any thing I know yet, these may be due to this rejected presentee. But I don't think that this Court could compel the church to replace the one, or that it can now compel it to induct the other.

Thinking that *the particular matter* now sought to be declared is beyond our power, I am not much disposed to make the opposite supposition, and to go into the case *upon its merits*. But I must say in general, that I can discover no illegality in the act of Assembly of 1834, and consequently none in the presbytery's obeying it. So that, though we had jurisdiction, there is no ground for our interference.

This act has been challenged on various points, with which I conceive we at present have nothing to do. For example, that part of it which restricts the power of dissenting to the male heads of families, instead of giving it to all the parishioners, has been censured as a limitation of the right of the people. The 16th regulation has been objected to, because it tends to increase the chances of the *jus devolutum*; and the 17th was challenged, because the presbytery, when it does present *jure devoluto*, is not put under the operation of the act. Now, if we were engaged with any case depending on these articles, or in a general declarator of the invalidity of the whole system, we would be obliged to consider these provisions. As at present advised, they appear to me to be much misunderstood. But let them be held to be all unwise and illegal. This does not solve, or even tend to help us to solve, the question that has actually occurred, which arises out of the act, and not out of these regulations, which being no part of the act, have never yet been passed into a law.

Now, confining ourselves to the matter that is properly before us, I am not in the smallest degree affected by the criticisms that have been made on the form or phraseology of the act. It might certainly, by a little dexterity, have been made less assailable in its mere appearance. But giving it fair play, and looking at its plain object and substance, it is truly what it styles itself, an act for the regulation of calls, and through calls, for the ascertainment of the quality of acceptableness. Of the Church's power to regulate these matters there cannot be a doubt. The only question is, Whether the late regulation be lawful?

It is said to be unlawful, 1st, because effect is given to the dissent of the people, without their being obliged to state what are called reasons; 2dly, because the presbytery, instead of exercising its own judgment, reject upon this dissent by order of the Assembly.

Now, as to *reasons*, I am not aware that there is any law of the State which makes these indispensable. No statute mentions reasons except 1690, 23. But this act stands repealed by the 10th of Queen Anne. And even when it was in force, it did not apply to this case. It related to a period during which patronage was vested in the heritors and elders; and the congregation being thus thought to be protected to a great extent, was only allowed to object on cause shewn. But I am not aware that there is any other statute which even alludes to such a restriction. The pursuers appeal, however, to the law of the Church, and say that it at least requires what they call a *trial*, of which *reasons* for disliking, form a part.

But, in the *first* place, it is by no means clear, that even the law

of the Church *ever* made this precise form indispensable. On the contrary, the declarations of the Assembly in 1649 and in 1711, appear rather to make the dissent of the *majority* conclusive without reasons. But in the *second* place, if the law depends upon *ecclesiastical* regulation, this implies that it is subject to the legislation of the Church. It cannot surely be maintained, that a thing introduced merely by a law of the Church, must be adhered to for ever, though against the fixed sense of the Church. And, in the *third* place, although it were to be held that there must be reasons, there is no definition or description given any where of the nature of the reasons; nor of the procedure under which they are to be brought forward. It is said that there must be "*just cause of exception.*" But it is the province of the Church to decide when the cause is just, and how its consideration is to be taken up. Now, is there any thing to hinder presbyteries from holding, that there can be no better reason for rejecting a presentee, than that, from his being deeply disliked, his being admitted is certainly to lead to the secession of the people? And if this *fact* be a valid reason, where is the law which prevents presbyteries from ascertaining it in any way satisfactory to themselves, and from acting on it forthwith? In any rational view, the objectors in the present case *did* give in their reason, when they attested the fact. What else would they have required to do if the presentee had been dumb? They would merely have let the presbytery know the fact; and the fact is the reason. At least it is competent for the Church to hold so.

And this is the answer to the great objection, that the presbytery never took him upon his trials,—from which assumed fact it is inferred, that the defenders can claim no benefit from their being the exclusive judges of qualification; because they never performed the operation of what the pursuers call "taking trial of "his qualifications." If it be meant, that they did not go into a room, and sit round the table, and call him in, and put questions to him, this is true. This is an operation that is performed at a subsequent stage, and for other qualifications, after the call is sustained. But if it be meant to be said that they did not try him at all on one qualification,—namely acceptableness, I conceive it not to be true. Sight is a qualification. But if the Church were to learn, after sustaining a presentation, that the presentee was blind, it would certainly not proceed to take him upon farther trial as to any other qualification, but would reject him on this fact. It may be that acceptableness is no part of qualification. This belongs to a different branch of the argument; and the objections must not be mixed. But assuming that it is, in what better, or other, way could the presbytery try the qualification than by ascertaining the

fact? It need not be said that the veto of the majority does not ascertain it; because the mode and the sufficiency of the proof is, for the ecclesiastical court.

I cannot believe that the law could even be meant to be taken in the pursuers' sense. Because reasons, in their sense, are as conclusive when urged by a single person as by the whole parish; and nothing can be more plain to me than that a different sort and degree of weight has invariably been given to the will of the parish, than to individual objections on cause shewn. And this on a ground on which we all act every day in real life. The experience of every hour attests, that in the preference of individuals, in reference to particular offices and duties, we are actuated not only by feelings which, though irresistible to us, do not admit of being made intelligible to others; but by reasons which, however satisfactory to ourselves, can never be justified by proofs. It is a mere farce, to tell a pious rustic that he may object to his intended minister, but that, though he feels a repugnance to him which must drive him, as it has driven a third of the people, from the Establishment, this will be totally disregarded, unless he can first analyse his feelings, and then extract their reasons; and lastly, support these reasons to the satisfaction of a doubting presbytery, by argument or evidence.

Then, as to the presbytery not having exercised its own judgment, the idea proceeds from a misapprehension of the constitution of the Church.

There is no statute which enacts that presbyteries must exercise any independent judgment of its own in this matter. The only law given by the State, consists of the general principle, that the collation belongs to the Church, and the State leaves the Church to supply the subordinate rules. The Church has, accordingly, devolved the duty of judging of the fitness of presentees on presbyteries, but it certainly never parted with its right to instruct and control them. The General Assembly is just as much entitled to instruct presbyteries, and imperatively, as your Lordships are to instruct sheriffs. In so far, therefore, as the objection means that the presbytery was not allowed to decide, *according to its own independent caprice*, I am of opinion that there is no law, *beyond the will of the Church*, which requires them to be so. The act of Queen Anne, and other statutes, declare that presbyteries shall "receive and admit," but do they ever say that, in discharging this duty, they are entitled to throw themselves loose from the control of the supreme authority? A presbytery, in obeying a direction from the Assembly, *does* exercise its own jurisdiction, and even its own discretion; for no inferior court can be heard to say, that it has a discretion rebellious to that of its superiors.

Accordingly, there is nothing new in the General Assembly making a law to control, and even to supersede, presbyteries in this very matter of the admission of ministers. A patron on one occasion, gave a presentation to a *blind* presentee, on which the Assembly passed an act (1761), precisely analogous to the late one; by which, instead of leaving the matter to be discussed and disposed of, either one way or other, in the presbyteries, all such cases are ordained to be sent to the Assembly itself. They don't allow presbyteries to exercise any judgment on the matter; and in the case of persons obtaining licences or ordination beyond the bounds of the Church, it went a step further; for instead of letting presbyteries first exercise their discretion on these matters, and then correcting their errors on an appeal, presbyteries *are enjoined at once to reject* the presentation or the call (1799), as given to a disqualified person; that is, the Assembly fixes to all presbyteries beforehand what their judgment is to be. I do not see that they have done more here. Instead of letting their time be consumed by discussions on each particular case, they have adopted a general rule, and compelled presbyteries to act a part from the first. If, as I hold, this be a matter within their cognizance, so that the Assembly could always review the proceedings of its inferior court, I cannot conceive why it cannot instruct that court prospectively by a general regulation.

As to the legality of the regulation *in its substance*—that is, in its directing the dissents to be held fatal,—it is implied in all I have said, that I think this within the power of the Church, and that, therefore, it cannot be dealt with as illegal in the civil court. Suppose that the Church, without passing any act, had merely become convinced that no call was sufficient, and no presentee qualified, which or who, was objected to by a majority of male heads of families, and had resolved to act on this opinion *in every individual case*. Can it be said that this Court could have interfered, and have prescribed an opposite course to that House? I cannot conceive it. Then, if the Assembly could have acted on this principle in every case separately, I cannot understand why it is unlawful for it to do the same thing, openly and systematically, by a general law.

It is said that they can do nothing to hurt the right of the patron; and this position forms the body of the pursuers' case. The Church must so act in the framing of all its ecclesiastical arrangements, as that no particle of the patron's right shall be touched, even incidentally. In law, I think this principle sound, and I am for enforcing it. But what is the patron's right? The Church being satisfied as to the qualification and the call, is a condition of his right. Or, as Dr Cooke, so often referred to by the pursuers,

says, " Patronage in Scotland never was an unconditional right ;
 " it could be exercised only in favour of a particular description
 " of persons, and it belonged to the Church courts to determine
 " whether the selection by the patron had been properly made." The act of the Assembly may amount to the total abolition of patronage, according to the views which some entertain of patronage ; but though it may indirectly check its abuse, it does not interfere with the *right* as established by law. If it be meant to be said that the Church can do nothing which fetters the *exercise*, or lessens the *marketable value* of the patron's right, this is contradicted by a long course of sound precedent.

Originally there was no prescribed qualification whatever,—not even a licence. Accordingly all that the statute 1567, 7, directs patrons to attend to, is, that *they themselves* be satisfied. The patron is to " present one person qualified to his understanding." But the Church did not long leave him the whole world to choose from. It has gone on for above two centuries, narrowing the exercise of his right by introducing the great check of the licence, and altering qualifications and procedure at its pleasure. And even after the system seemed to have been complete, it has never hesitated to create new disabilities in the form of improved education and otherwise, when this has been found expedient. Deafness, blindness, and ignorance of Gaelic, are examples. Twenty-five was at one time the earliest age. It is now twenty-one. But the Church, as I conceive, might raise it again without being controlled, at least by this Court. The most conclusive of all examples is the law passed in 1815, on the recommendation of Principal Hill, against pluralities, whereby patrons were prevented from combining the office of the ministry with certain professorships. It was not left to presbyteries to consider the inexpediency of the union, or to decide whether the popular aversion to it was a causeless prejudice. The matter is taken out of the hands of presbyteries altogether, and it is declared by a positive and a new rule, introduced solely by the legislative power of the Assembly, that the co-existence of these two offices shall imply a disqualification or unfitness to perform the clerical functions. One of the direct effects of this, is to limit patrons in their choice of presentees by introducing a new incompatibility. There cannot be a better proof of the general conviction of the lawfulness of this change, than the fact that it has been acted upon without challenge ever since.

Another example is exhibited in what takes place in *translations*. There is nothing unlawful in a patron giving a presentation to an ordained minister holding a cure ; nor in the minister accepting of this presentation ; nor in the people all giving a call ; nor in his present parishioners being willing to let him go. But still it is,

beyond all doubt, competent for the Church to interpose, and to keep him where he is. In principle, this is a stronger interference with the supposed right of the patron, than when he is merely not allowed to obtrude a new member into the ministry.

An attempt has been made to reduce this view to absurdity, by supposing that the Assembly was to instruct presbyteries to reject presentees capriciously, as, for example, all those with particular names or dresses. Scotch national names and dresses have actually been proscribed by parliament in modern times, and if they were to become the symbols of certain unclerical principles or characters, I don't doubt that the Assembly might, and would, declare their use sufficient to exclude. But it is not in this, nor in any other *rational* sense, that such a supposition is made. Its meaning is, that the Church, with the evident design of usurping, should attempt to exclude, by the introduction of fantastic tests, plainly calculated merely to enable it to evade the law. Put thus, all such suppositions are unworthy of an answer. No real question of disputed power is ever advanced in its discussion by its being assumed that the power is to be abused. Nothing is easier,—and nothing is more idle,—than to state cases founded on the fancy, that all the authorities of the realm, or that any of them, under the pretence of exercising their discretion, are to abandon it.

Another ground on which this act has been challenged, is, that it introduces a disqualification, of the existence of which the patron could not be aware, and makes this be judged of, by delegation to a new body, interjected between him and the presbytery.

The delegation and interjection is a mere mode of expression. In truth it amounts to this, that the Church decides on a fact, and that this fact is established by a particular dissent. The same thing might have been said though the late act had never been heard of. If no one person were to sign a call, I hold it to be unquestionably competent for the Church not to sustain it; and here is a foreign body deferred to between the presentee and the patron. Presbyteries examine the learning of presentees themselves. If one of them happened to be modest about its Greek, and chose to call in the aid of some professor deep in that tongue, by whose opinion it previously bound itself to abide, would this be an illegal delegation of its power?

As to the disqualification being unknown to the patron,—many other disqualifications are liable to the same objection. The patrons who first gave presentations in favour of persons blind, deaf, or ignorant of Gaelic, could not, *till then*, be aware that these circumstances were to be deemed fatal to their gifts. And even as to the established and known disqualifications—such as classical learning—though the patron may satisfy *himself* on these points, he can never

know what a *presbytery* is to think of them. Is not every patron subject to the condition that the call must be sustained? And how can any patron, supposing the late act had not passed, be sure what concurrence the church would ever require? The truth is, that there are few qualifications on which a patron may, with more probability, satisfy himself, than the one in question. If he will attempt to thrust a person upon the parish without endeavouring to ascertain his probable reception, the result may be disagreeable. But I do not think that any patron, who, though the patronage be his property, is bound to consider the public in his exercise of it, can complain of being required to try to discover the parochial feeling before he presents; and though he may not concur in the propriety of the feeling, he can scarcely ever say, truly, that he could not ascertain what it was.

I cannot conclude without noticing what has been said about collision. The defenders endeavour to alarm us, by shewing how they may set our judgment at defiance; and the pursuers try to allay the alarm by assuring us that the Church will speedily yield. This is a matter which concerns the Court more deeply than some of your Lordships seem to be aware. No doubt it is our duty to declare the law, and the duty of all to obey it. I cannot doubt that the Church will obey it, both from inclination and necessity. But it is also the duty of a Supreme Court to avoid every collision, through which it cannot see its way. Its dignity must necessarily be put in jeopardy by its exposing itself to a conflict in which it cannot explain how it is to prevail. This, I fear, is the position in which this Court is about to place itself. It is about to enter upon an untried voyage without a compass or a star. From the moment that a judgment shall be pronounced in favour of the pursuers, the civil and the ecclesiastical authorities *are* in a state of legal collision. Yet it is disclosed that no one, either at the bar or on the bench, can tell us what is to come next. Certain proceedings by the Church may be anticipated. To meet these we have had nothing definite laid down; but, after hearing some ulterior steps suggested, which make one start, we are told to rely on the latent vigour of the law. I do rely on it with the greatest confidence. But it is this that alarms me. For it may remain to be seen, whether, *under the law*, the defeat of what our judgment means, may not depend too much on the pleasure of the Church. The Church may be tempted to find out what its dormant powers are also; and whether there be expedients within its reach, by which the objects of the late act may be practically secured, though the act itself be quashed. The probability of this is, of itself, no inconsiderable proof that we have gone out of our province, and encroached upon a field to which our power does not extend. Whatever

it may do, I hope that the Church will excuse one who counts himself among its warmest friends, if he venture to express a wish that it may proceed with sobriety and candour ;—not misled by the irritation of a disappointed litigant, nor by the mortification natural to men who find that error has made a favourite object fail,—but thinking of duty more than of victory,—recollecting that this excitement of the public attention may of itself abate the abuses of patronage ; and that its true policy is, never to keep itself in opposition to the civil power one moment longer than is indispensable for the maintenance of its authority and usefulness.

Wednesday, March 7.

THE LORD PRESIDENT.—“ LORD CUNINGHAME.”

LORD CUNINGHAME.—My Lord President, When the very able argument which was addressed to us in this case from the bar was closed, I felt myself unable to resist the conclusion, that the declaratory branch of the pursuers' summons, was maintainable in this court, and well-founded in law; and I need hardly add how much that opinion was confirmed by the elaborate expositions of the law, given by the majority of your Lordships in the earlier part of our deliberations last week. But latterly a series of opposite opinions characterised by the greatest learning and most powerful reasoning, have been delivered by my brethren who have spoken last, to which I have listened with the deepest attention; but my former impression remains unshaken, that the pursuer is entitled to judgment in terms of the declaratory conclusions of his libel.

At the same time, I am as much impressed as any Judge can be, with the magnitude of this case, or rather with the momentous importance of some of the questions which have been incidentally and perhaps unavoidably raised in the course of the discussion. My learned brethren, from whom I have the misfortune to differ, consider that the mere entertaining of such an action as the present, may affect the rights and independence of the Church, and consequently impede its ministers in the sacred duties which they are appointed to discharge. On the other hand, my conscientious conviction is, that, if the pursuers' case as laid, were found incompetent in this court, it would be a determination of the most fatal and dangerous import to the rights and liberties of the people of this country. These mainly depend on the efficacy and supremacy of the civil tribunals to protect and preserve inviolate the whole property of the lieges. In so far as this is secured by statutes of the civil legislature, these can only be interpreted by the civil judges of the land, trained by education and long experience to this high and responsible duty. But the plea of the defenders, as I conceive, leads to this, that while the Kirk as a state establishment derives its powers, and privileges, and endowments solely from the statutes

of the municipal legislature, it may either directly, or by the most palpable evasion, reject or defeat, without any control from the Civil court, the most valued patrimonial and hereditary rights of others, declared in the very statute under which the present system of Church government was established and founded. Were any such doctrine sanctioned, it would, as I conceive, lead to an ecclesiastical despotism within the state, as alarming in itself as it would soon be destructive of that establishment itself, for which this extraordinary and irresponsible power is claimed.

I know well that no such consequences are apprehended by such of your Lordships as support the plea of the defenders. If it were, they certainly would be the very last men to give it any countenance. I am aware, that they not only view the presbytery as having acted within their powers, but think that they gave effect to the rights of the patrons, at least as far as any such rights can be maintained in the times in which we live. But to my poor understanding, this is incomprehensible. When the presbytery rejected the presentee, in the present instance, *without examination*, because the majority of the heads of families dissented from the presentation, they virtually, and as I believe the plain sense of the great bulk—the majority of mankind, will pronounce, transferred a part and portion of the patron's right of nomination to other parties, and so refused effect to a civil right constituted by the same statutes, under which alone they themselves had any jurisdiction in the matter.

If this, however, be the effect of the proceeding of the presbytery under review, it strikes me, that it cannot be too jealously watched or too promptly checked. Let patronage be ever so inexpedient, or ever so unsuited to the present feelings and wishes of the people; if it really be so felt, the remedy obviously lies not with the Kirk, who can in no shape restrict the civil rights of any parties, but with the civil Legislature who can alone abrogate or modify, by any direct law, the rights of patrons which are so anxiously and expressly reserved entire by a series of statutes, both ancient and modern, still in full force.

Hence, even if I were as averse, on views of Church policy, to patronage as its most strenuous opponents are, I should hold it alike unconstitutional and unwise to seek relief in the form complained of in the present action, at the hand of the Church court. If they, or any body within the state, are permitted either directly to violate, or indirectly, and by a thin disguise to defeat the civil rights of parties, this is laying the foundation of an irresponsible power, pernicious in point of example, and incalculably dangerous in its consequences. And let us not be deceived by the apparent concession to popular rights which may be supposed to attend the particular case now before us. If the Kirk can, at its own hand and in

defiance of the civil statutes and tribunals, restrict, under the profession of regulating, the exercise of patronage in one year, they may entirely abolish it in the next. This, of course, is a consummation to which many look devoutly forward. But who can say that the power and interference of the Kirk will stop here. If they could of their own assumed authority first restrict and then rescind patronage, may they not ere long resume the privileges which they may allege they have given to the people, and place the nomination and election of the whole ministers of the country under regulations calculated only to serve the purposes of bigotry or faction? May they not refuse a presentation, unless the candidate, as enacted by the General Assembly in 1596, has *the previous consent* of the presbytery; or unless he submits to some new test calculated more than any now existing to fetter his understanding, or impair his usefulness? And all this power uncontrollable by civil courts, is to be wielded by a body, it is believed, of indefinite expansion in point of numbers, and enjoying within the State, valuable patrimonial endowments and temporalities derived from the acts of the civil legislature. It requires no sagacity to foresee that such a state of things would never be permitted to continue. It would in fact afford a constant and never ending topic for the annihilation of a religious sect exercising or usurping such powers, when upheld and supported by the State.

These considerations, however, lie on the very surface of this case; they were early suggested to my mind by the plain narration of the facts in the summons, which, in my humble opinion, sets forth the nature of the wrong of which the pursuers complain, as fully and as precisely, as can be reasonably and competently required.

Yet while the Summons as amended appears to me to be a writ satisfying the strictest forms of our law, such is the diversity of opinion arising in this extraordinary cause, that some of your Lordships, whose opinion I must ever highly regard, consider it either as plainly incompetent on its own narrative, or as unfit from many alleged defects and imperfections, to raise almost any of the questions which have been so deliberately discussed and considered by us. This has led me again to examine and analyse the Summons with all the care in my power; and I must own I should think it a precedent fraught with danger to the law and its present forms, if this writ were not held as sufficient to raise every question necessary for the full extrication of the pursuers' right on the one hand, and of the defenders' pleas on the other. I shall afterwards consider the jurisdiction of the Court to entertain the question; but let us for a moment attend to the Summons.

The Summons as framed then sets out, (1.) With the specification of the pursuers' title to maintain the action. (2.) It narrates

the whole civil statutes from 1567 to 1711, by which the rights of the patrons, as the pursuers maintain, are constituted. (3.) It narrates with accuracy the proceedings of the presbytery, by which the pursuers allege that they have suffered wrong; in particular it narrates the minute rejecting the presentee without taking any trial of his qualification, on the ground that a majority of the heads of families dissented from his call and settlement; and the narrative of the summons concludes with the following distinct summary of the civil wrong or injury which forms the ground and substance of the action at present before us. “ Nevertheless, though the pursuer, “ the said Robert Young, is duly qualified as a licentiate of the “ Church of Scotland, and presentee foresaid, as well as in all other “ respects, to be received and admitted minister of the church and “ parish of Auchterarder, and though no objections have been “ stated against his qualifications, the presbytery not only refused, “ and continue to refuse to take the pursuer upon trials, and to “ pronounce judgment on his qualifications as presentee, or to admit and receive him as minister of the said church and parish of “ Auchterarder, but have by their sentence rejected him as presentee to the said church and parish without trial, and without taking cognizance of his qualifications as presentee, and expressly on “ the ground that they cannot and ought not to do so in respect of “ a veto of the parishioners: In all which respects the said presbytery, and the individual members thereof, have exceeded the “ powers conferred on them by law, and acted illegally, in violation “ of their duty, and of the laws and statutes libelled, and that to “ the serious prejudice of the patrimonial rights of the pursuers.”

Then follow the declaratory and petitory conclusions of the summons, which it is unnecessary to repeat. Some of the latter of these conclusions certainly admit of great doubt; but on the other hand, if there has been a violation of a civil right—a rejection of a qualified presentee without legal and sufficient cause, and without trial, this at least presents a case set forth with sufficient accuracy and precision in the summons to enable us to enter on the question.

I shall afterwards consider how far this court has jurisdiction to entertain and take any cognizance of the case. But at present, and in so far as relates to the form and structure of the Summons, I ask with the greatest deference, that this Writ be compared with any of the best models of summonses in our practice, on which cases of the highest importance have been tried in Scotland; and I feel persuaded, that according to whatever test it may be tried, it must be found at least thus far correct and complete, as to be fully sufficient for the trial of all the points which have been agitated in the present question.

No doubt it has been objected, that the Summons here does not set forth the particular statute among those libelled on, under

which it is maintained to have been incumbent on the presbytery to take trial of the presentee's qualifications; to which it is obvious to answer, that, as all the statutes recited in the outset of the summons, either give that particular right expressly, or by the most plain implication to the presbytery, it was quite unnecessary (as it would have been unusual according to our forms) again to quote it in any subsequent part of the summons.

Next, it has been said, that nothing is set forth in the summons as to the legality or illegality of Calls as an ecclesiastical proceeding, or as to the competency or nullity of the veto act, though it is added, that much argument has taken place on these topics in the course of the discussion. But to that, and to various other criticisms of the same description on the summons, it occurs to me as conclusive, to state, that it would have been alike superfluous and improper for the pursuers to have made any reference to calls in the summons. These did not necessarily form any parts of the *pursuer's* case. The ground of the action is, that a presentation by an undoubted patron to a qualified presentee, was rejected without cause by the presbytery. That, again, is met by the defence, that the presentee had not a sufficient Call, under the act of Assembly of 1834. This certainly opens up the whole question of Calls, and of the legality of the act of Assembly in 1834; because the pursuers, according to every system of pleading, are entitled to meet pleas in defence by the rejoinder, as to their competency and relevancy, which such pleas suggest.

Applying these observations to the present case, it is next proper to attend to the Record, where the pursuers make an averment, which, in fact, constitutes the whole of their case, while the defenders brought forward in full narrative, the procedure as to the call and the enactments of the act of Assembly, which, of course, form their justification. Accordingly, in article 11 of the condescendence, it is set forth, "That the foresaid sentence, whereby
"the presbytery rejected the Rev. Robert Young, pursuer, as
"presentee to the church and parish of Auchterarder, proceeded
"exclusively on the ground of the veto, or dissents exercised by
"the alleged majority of heads of families, or parishioners of
"Auchterarder."

To which this answer is made, "11. Admitted."

The facts supposed necessary for the pursuers' case being thus fully and judicially established, the record of the defenders proceeds to narrate their proceedings as justified by the interim act of the General Assembly in 1834, (see statements by defenders, Arts. 10, 11, 15,) and of course the pursuers plead, and were entitled to raise pleas, that this act, as flowing from the authority of the Kirk alone, was *ultra vires* of the Assembly, and such as

could not justify the presbytery in a Court of Law, in refusing effect to the civil right of the pursuer.

There is not only nothing in all this contrary to our forms of pleading, but it is manifestly consistent with every-day practice. Hence the whole objections to the Summons come to this,—that the pursuers did not *anticipate* all the pleas to be raised by the defenders in answer to the action,—and that they did not insert conclusions or counts in the summons, specially to declare the invalidity and insufficiency of each. But I speak under the correction of your Lordships, if such a style of summons has ever been required in any case in our practice ; and I doubt if it can be exacted under any system however cumbrous and redundant its forms may be. Indeed, it is hardly possible for me to conceive what sort of writ the Summons here would have been, had it contained all the minute requisites, contended for as necessary in the present instance.

It is in general very unsafe to refer to other systems for illustrations in point of form ; but it is supposed that the cases are innumerable in English practice, where the whole argument which afterwards takes place in the cause, is on pleas raised by the defendants, and not anticipated at first in any shape by the plaintiff. Hence it is believed, that in English practice, the most important competitions for real property, are tried upon short writs of ejectment, where the defendant puts in his title in defence, on which alone the question is afterwards tried. And in the late noted case of Stockdale, when he brought an action against the printer of the House of Commons for libel, the greatest constitutional question which has been for many years tried in a court of justice, as involving the powers of one of the branches of the Civil legislature, the plea as to the right and privilege of the House to protect their officers and others from all responsibility when acting under their orders, was raised collaterally and incidentally on the defence alone, and neither was, nor could be anticipated by the plaintiff.

In every view, therefore, the summons appears to me to be in correct and regular form ; and upon that writ, and upon the record, the parties have competently joined issue on all the questions which have formed the subject of our deliberation.

Before entering on these questions, however, it is necessary for me to advert to another plea hardly touched on by the counsel,—but which one of my brethren has dwelt on at great length and with much power, I allude to the plea of homologation and acquiescence. But I must own I think there is no room for this plea. The defenders apparently conceiving that it was untenable, have entered no such plea on record ; and if they had, it does not appear to me that it would have been maintained. The category of cases in which the plea of homologation is received in our prac-

tice, has of late been gradually narrowed ; but I can hardly conceive that at any period of our law, or in any other system where the principles of jurisprudence are well understood, there would have been room for it in such a case as the present.

Homologation is a plea of waiver, which may in some rare cases be urged by one private party against another, when an individual by his conduct is presumed to abandon a legal objection or ground of challenge competent to him. But such a plea can never be applied as between a party and public functionaries dealing with a legal right presented to them for execution. It is impossible to presume waiver in such a case. If the right founded on be opposed or postponed on any ground by those bound to give it effect, it is most excusable and legitimate for the claimant, in order, perhaps, to save himself from much delay and heavy expense, to endeavour to shew that his case does not fall within their rules as alleged by themselves, but in doing so he makes no implied waiver or surrender ; and if a public body ultimately reject his right on any ground, the decision must be exposed to all the grounds of challenge, competent to the party, whose claims have thus been disregarded. I am not surprised therefore, that the defenders did not put on record, or seriously urge in argument, any plea of homologation and acquiescence in the present case.

The pursuers' case then, as brought before us, being excluded by no plea in bar, and being set forth in a summons and record framed in proper technical form to raise the important questions which have been so anxiously urged by the parties, it is proper for me now to explain the grounds on which my opinion on these points rests.

Fortunately the merits of this case, depend on a state of the facts as to which there is no dispute. It has been shewn from the record, that the pursuer, Mr. Young, is at present a licentiate of the Church of Scotland ;—he holds a presentation to the parish of Auchterarder, given by the legitimate patron, within the statutory period after the last vacancy ;—the presbytery in form gave a deliverance to a certain nominal extent sustaining the presentation, but they never took trial of his qualifications ; they rejected Mr. Young, because the majority of the heads of families in communion with the church in the parish, signed a document declaring that they did not consent to the pursuer's induction.

Upon this state of the facts, the *first* question which arises is, Whether the presbytery in this proceeding acted within their powers, or virtually refused to give effect to the statutory rights of the pursuer, upon objections not recognised by law ? The *second* question which depends on the first being resolved in the affirmative, is whether the pursuers are entitled to pursue the pre-

sent action before this court, to have these civil rights judicially ascertained and determined?

I. On the first of these questions it humbly appears to me that the pursuer's case is not only supported by every sound rule of construction, applicable to the statutes, on which the case depends; but that it is illustrated and confirmed by all the light which the law can derive from history, both at the period when the Reformed church was established, and in every succeeding era of its progress.

In the outset, it is not unimportant to advert to the state of the ecclesiastical law in Scotland as to patronage, even before the Reformation. It appears that historians are not agreed as to the precise period when patronage was first introduced into the Christian church, either in Scotland or in the other countries of Europe; nor is it material to enter into that inquiry in the present case. While the citations from the canon law given by Lord Corehouse shew, that in the primitive church, some pastors were chosen by election in a particular form, it is equally certain that patronage was recognised in the Catholic church for many centuries prior to the era of our Reformation. Accordingly, the law is thus laid down in the only authorities to which we can refer for the practice in Scotland prior to the Reformation. In the Reg. Majest. B. I. c. 2, sec. 3, this passage occurs in the translated copy:—"Bot ane laick patron sould be ware, that quhen ane kirk or vicarage, shall happen to vaick, that he present thereto ane worthie man, *qualified* in *literature, life* and *manners* within four moneths, (after that he knawes the kirk to be vacand) that be the langer delay of the presentation, he prejudice nocht himselfe."

The same doctrine, nearly in the same words, is repeated by Balfour, in his Practicks, which were composed or collected in 1565 or 1566, and must of course refer to the law and practice, as understood before the Reformation, and not to any new system propounded by the Reformers, which was not then confirmed by the legislature, and to which Balfour was known to be opposed, (p. 501.), "Ane laique patron, says he, of ony kirk or benefice vaikand, sould present thairto ane *qualifyit* and habil persoun, of sufficient literature, honest in life, and of gude maneris, within four monethis." In a subsequent section (6.) the author declares the right to a presentation or patronage, to be a question cognizable by the king's court.

These authorities, and the language in which they are expressed, appear to me to be of primary importance, as shewing what has been the understood and recognised import of the terms "qualified presentee," from the most ancient period. It related solely to the literature, moral and religious principles, and life and conduct of the individual presented; but at no period, at

least prior to the Reformation, did it imply any consent from the flock composing the cure. Let us next attend to the manner in which patronage was dealt with after the Reformation.

It is well known, that in 1560, when the celebration of mass was abolished by act of Parliament, the First Book of Discipline was composed and published by the able and zealous reformers who took the lead at that memorable era, with the view of laying down the polity which they expected would be sanctioned for the Kirk on its new and reformed establishment. In that book it was set forth generally, that "it pertaineth to the people, and to every several congregation, to elect their minister." But it is admitted on all hands that this book was never sanctioned by the civil legislature. Afterwards, in 1578, the Second Book of Discipline was composed; and in like manner in that work, among the heads of reformation which were craved, was "The liberty of the election of persons called to the ecclesiastical functions, and observed without interruption so long as the kirk was not corrupted by antichrist, we desire to be restored and retained within this realm, so that none be intrusit upon any congregation either by the prince or any inferior person, *without lawful election*, and the assent of the people, over whom the person is placed, as the practice of the apostolical and primitive kirk and good order craves."

It is quite plain, that if either of these books had in all points received the authority of the Legislature, there would be an end of the present question. But as they were not adopted, and as, on the contrary, in every statute passed after the Reformation, the rights of lay patrons were carefully and expressly reserved, the advancement of the claims on the part of the church, and their rejection by Parliament, must, according to every legal and rational principle of implication, be held to confirm the rights of patrons, as enjoyed *ab antiquo*, without any interference by the congregations.

It is unnecessary here to quote the various statutes, both ancient and modern, for the protection and enforcement of patronage, which have been so often enlarged on in the course of the present discussion. It will be recollected generally, that the first acts which were passed for the recognition of the Reformed religion were, when the administration of the government passed into the hands of the Regent Murray, in 1567. In that year the Confession of Faith was recorded in the statute book, and the 7th statute, passed at the same time, (1567, c. 7.), provided, that "the examination and admission of ministers within this realm be only in the power of the kirk, now openlie and publickly professed within the samin. The presentation of laick patronages alwaies reserved to the *just and auncient patrones*,

“ and that the patroun present ane *qualified* persoun within six
“ monethis,” &c.

As to the subsequent clause of this act, declaring, that in case of the rejection of a qualified presentee by superintendents of the kirk, there should be an appeal, I concur entirely with the great majority of your Lordships, that this applied only to the trial of the qualifications of presentees or candidates for license, and conferred no other jurisdiction by presbyteries over patronage. The usage of nearly three centuries confirms this view of the clause of the statute now referred to.

But next comes the act 1592, which has been appealed to by both parties, and is styled the great Charter of the kirk; and when it was enacted by this statute that the foresaid presbyteries should “ be bound and astricted to receive and admit whatsom-
“ ever qualified minister is presented be his majesty or laic pa-
“ tron,” the chief, and indeed almost the sole inquiry which arises in the present case on the merits, is, If under any sound and legitimate construction of that law, it can be held that the Legislature of the day, meant to reserve or bestow the slightest power either in people or congregation, to approve or reject a qualified presentee?

It is, with deference, quite impossible to refer to such a loose and desultory chronicle, as the published works of Archbishop Spottiswood, and still less to the brief annotations on its margin, as an authority either to explain or limit the application of this statute. It is enough generally to state, that the *calling* of ministers by the people, at least the consent of the people in their nomination, was *propounded* prior to this act. Had it been the intention of the legislature to concede it, they would certainly have declared in plain and express terms (as any prior usage in such matters, whatever it was, could have been then only of a few years' duration) that presbyteries would only be bound “ to
“ receive and admit whatsomever qualified ministers were pre-
“ sented by the laick patrons *with consent of the congregation.*” When no such qualification was inserted, it would be contrary to every fair rule in the construction of statutes, to infer, that such an important innovation and restriction on ancient rights was given by implication.

Farther, when this act, framed in terms well known in the most ancient records of Scottish law, and to which only one signification had been offered for ages, I conceive that it would be a violation of every rule in the interpretation of statutes, which a Judge ought to respect, to hold that the term “qualified” was used in this statute, in any new or undefined sense, or that it had reference then more than of old, to any thing else than the qualities and accomplishments of the individual presented. Hence, if

these be unexceptionable, the presentee's legal right under this statute, appears to me to be complete and insuperable.

But the act of 1592, though repealed as to patronage for the short interval between 1690 and 1711, was in substance revived by the British act of 1711, which specially declared, that Her Majesty, and other persons having right to patronages, should be entitled "to present a qualified minister or ministers, to any " church or churches of which they are patrons," and whom the presbyteries should be bound and charged to ordain and admit, &c. &c. Now, the import of the terms, "qualified ministers," in the legal and statutory language of England, or of Great Britain, at the date of this statute, was as clearly and incontestibly fixed, as it was in the ancient language of Scotland. Accordingly, I should think it altogether preposterous, formally to quote authority to shew the import of the words "qualified ministers" in English legal phraseology in 1711. I have no idea that any doubt was ever entertained as to them, either at that or at any prior period.

While the rights of patrons and presentees thus stand reserved and declared by the most positive statutes of the Civil legislature, it only remains to inquire on what grounds they have been disregarded in the present instance? And in reference to that question, the whole argument of those opposed to the presentee seems to resolve into *two* objections; 1st, That he was *not qualified*, in the sense which it is said the presbyterian system of Church polity now requires, as he was not acceptable to the people; and, 2d, That as he could not obtain the ecclesiastical requisite of a Call, in such terms as the laws of the church require, they were entitled to reject him, under the powers given to them by Statute to collate and induct ministers.

1st, As to the first of these grounds, there are in my judgment no *termini habiles* for pleading it in the present question. The records of presbytery shew, that the pursuer was *never* taken on *trial*. He was rejected before trial; and therefore whatever question may arise, if a presentee in every respect qualified by his piety, literature, and attainments, shall be rejected as disqualified, because he is not acceptable to the people, unquestionably the case does not here arise. If it did, I should clearly pronounce it contrary to the *bona fide* sense and intention both of the act 1592 and 1711, and I add, that no such expedient for evading the statutory rights of patrons and presentees appears to have been generally acted on even in times when the most rooted hostility to patronage was openly avowed. If it had, the Church courts could always have given the people the remedy they desired. But hitherto the clergy had too much regard for their honour and their oaths of office, to reject as "unqualified"

any man of unblemished life, and unquestionable attainments in literature and theology, because he might be open to a different ground of objection by not being acceptable to the people. However desirable it may be thought by some, that only those ministers who are agreeable to congregations, should be settled in any benefice, any objection founded on an opposite view, is utterly untenable so long as the present statutory law stands as it does. Neither can I admit that this is a point merely of Church law. It must be regulated entirely by the legal construction of the civil statutes of 1592 and 1711, which this Court alone is entitled to interpret; and I have already fully explained the grounds on which it humbly appears to me, that only one construction can be put either in legal or in popular language, on the nature of the "qualifications" required under these acts.

2d, But the other ground on which the proceeding of the presbytery in rejecting the pursuer as presentee, is defended, seems to be that which is most confidently relied on by the defenders. It is said, that all the ancient laws relating to the rights of patrons here were respected, that the presentation was received by the presbytery, in the first instance, and that it was *sustained*; but that the presentee was rejected, because he could not get a sufficient *Call* as a necessary step in ecclesiastical procedure towards induction. The *Call*, it is said, was validly and competently regulated by the law of the General Assembly of 1834; and if so, this Court is not entitled to sanction any plea founded against any inferior Church court or judicature who acted upon it.

I am sorry that, upon the best consideration which I can give this case, and on the most careful research into the authorities applicable to it, I cannot bring myself to assent to any part of the reasoning on which the preceding plea is founded.

In the first place, it humbly appears to me to be almost too ludicrous for serious remark to set forth here, that the presentation was *sustained* by the presbytery here to any effect. It was, indeed, nominally sustained by an interlocutor of the presbytery; but nothing available to the presentee followed on that step. Instead of taking trial of the qualifications of the presentee in terms of the statutes, the presbytery, on the dissent and objection of certain parties *without cause and without title*, positively declined to take any trial of the pursuer's qualifications, and forthwith rejected the presentation. In taking this course, it humbly appears to me, that the presbytery acted in direct opposition to the civil law of the country as it at present stands in our statute-book.

In the next place, I cannot admit that the Church courts were justified by any law which is binding on this Court in making the fate of the pursuers' presentation depend on what is termed the

Call in any form ; and still less so on the form of call which the presbytery required in the present instance.

With regard to *Calls*, although some little obscurity attends their history, still their origin as I conceive, may be traced with an approximation to accuracy sufficient for the present discussion, and I concur generally in the statement on this subject, so well given by Lord Mackenzie. There was certainly no such proceeding as Calls prior to the induction of ministers in the Catholic church, at least in the later period of its history. But when the Reformation took place, the early reformers were desirous to make all nominations to the ministry, by open election or calls. Hence, in the First Book of Discipline, the *vocation* of a minister is said to consist in *election*, examination, and induction ; and the form of a call given by ecclesiastical writers, and indeed that in ordinary use at the present day, is just an Instrument of nomination and Election. It makes no reference to the presentation of the patron ; for it was introduced at a time, and by parties who disavowed patronage. The Vocation, call, or election, was introduced, when the Catholic religion was first overthrown, and when the reformers intended to seize the patronage for the people, if they could obtain it. Accordingly, in the troubled period which succeeded the reformation, i.e. between 1560 and 1567, and 1592, there were many instances of these Calls, under which ministers were elected, and even settled, without any presentation at all from the legal patrons. Examples of these were given by Dr. Lee in the appendix to his evidence before the House of Commons in 1834 ; and it is sufficient here to refer to them.

But when the rights of Patrons came to be finally and authoritatively recognised in 1592, the form of a call by the people, as devised in the first years of the Reformation, was superfluous. Their consent was not required by the statute ; and if any presentees were objectionable as for cause, there was sufficient opportunity to take that course when the Edict was served, which has been the form established from a very early period, of calling upon the flock, to object if they have any special cause. Accordingly, it is believed that Edicts have been served for this purpose, prior to induction, in all countries where any form of Christian faith, Protestant or Catholic, is professed.

If, however, the Election or Call of ministers by the people was superseded, and in fact virtually excluded by the act of 1592, which in other enactments conferred great privileges on the Kirk, it would not affect the present question, even if it could be shewn that the Church courts had of their own authority introduced or kept up forms to interfere with, and obstruct the law of patronage after it was authoritatively established by the civil legislature. The kirk could not take the rights conferred on them by this

statute and object to the restraints. They could not at once adopt and reject the same law. They could not claim the benefit of the Statute, in so far as it was favourable to them, and deny its authority, in so far as it limited their claims.

Nevertheless, the ecclesiastical records certainly afford some evidence to shew, that from ignorance, false zeal, or an ambitious spirit, cherished by the weakness of the civil government in unsettled times, the Kirk did form a plan, very early after 1592, to defeat the rights of patrons in the face of the law. With this view the General Assembly, without any sanction from the Civil legislature, set to work of their own authority, to pass the act of Assembly of 1596, which has been repeatedly alluded to by your Lordships. That act was expressed in these terms, "Because
" many are thrust in forceably in the ministrie upon congrega-
" tions by *presentation*, who manifest after, that they were not
" called by God, it would be provided, that none seek presenta-
" tion to benefices, *without the advice of the presbyterie*, within
" the bounds where the benefice lyeth; and if any do the con-
" trair, that they be repelled as *rei ambitus*."

This was an act by which the Kirk attempted at their own hand, and in violation of the civil statute, to transfer a part of the right of patronage to their own body. The consent of the presbytery was made necessary, before a presentation, even to a qualified party, was effectual. It is evident, that nothing but the rudest conceptions of law could ever lead any parties to suppose that the Ecclesiastical body alone could carry such a law into effect. It was a mere *protestatio contra legem* by the kirk in a rebellious year, intended to shew that they did not acquiesce in patronage to any extent. It was in fact the same sort of *protestatio* which the General Assembly exhibit in another part of their proceedings each year at the present day. Though they are authorized by their Statute of foundation to hold General Assemblies, provided the king's commissioners be present before the dissolving thereof, and name the time and place when the next General Assembly is to be holden, the Kirk decline to recognise that statutory provision, but they invariably go through a form of dissolution of their own, and nominally fix their own time of meeting, coincident, no doubt, with the day fixed by the High Commissioner. But it is not supposed that any lawyer would contend, that the pretensions of the Assembly on this point, could enable them to hold a meeting of their own authority, at a different time or place from that authorized by the statute, and at which any proceedings would be binding on the lieges, or noticeable in the civil courts. Such meetings, for aught that I know, might be consistent with what are called the laws of the Church, or with some of the multifarious resolutions passed by the Gene-

ral Assembly during the time of the Commonwealth, or the struggles of the Covenant; but they would have no effect in a Civil court, if they were shewn to be inconsistent with the civil statutes, under which alone the kirk was erected into a separate establishment in the State.

But to return to Calls, in so far as I can form an opinion as to the laws and usages of the church, I think it has been made out to demonstration by several of your Lordships, that during the very troubled period between the Reformation and the Revolution, there was no such Call ever in force as is assumed in the argument of the defenders. The people never, even in the highest ascendancy of presbytery, had any right to object without cause. No doubt there was the famous resolution of the General Assembly in 1638, when the country was on the eve of rebellion, that "na person be intruded into any office of the kirk contrary to the will of the congregation, to which they are appointed." But even that regulation is to be taken *sub modo*. It was explained when the Directory of 1649 was framed and promulgated, and what has been called the principle of non-intrusion, only received effect to this extent, that the Elders had right to propose a person to the congregation; and if the major part of that body dissented from his nomination, then the presbytery of the bounds were to cognosce and determine whether or not the dissent was grounded on *causeless prejudice*, and if it was not, they were to proceed to a new election; but of course if it was, they would proceed with the settlement. Without enlarging on a topic already exhausted by many of your Lordships, that appears to me to be the very reverse of a rejection without cause.

At the sametime I concur with several of your Lordships in thinking that all research into the church law as to calls, and all controversy respecting them, is in a great measure superseded by the act 1690, cap. 23, concerning patronages. Here we have recorded in the most authentic form the ecclesiastical law and course of procedure as to Calls. This Statute has been generally talked of as an act abolishing patronage, but it was not truly so. It was an act whereby the heritors and elders of each parish as constituting a sort of corporation *quoad hoc*, were authorized when vacancies occurred to propose a person to the whole congregation to be either approven or disapproven of by them. Now the framers of that act, never proposed that the congregation should be allowed to disapprove *without cause*, because they saw that would just in other words have been giving them the election, but the statute enacted, "If they disapprove, that the disapprovers give in their *reasons* to the effect the affair may be cognosced upon" by the presbytery of the bounds, at whose judgment and by

“ whose determination the calling and entry of a particular minister is to be ordered and concluded.”

Here then is evidence not to be controverted, on the face of the statute book, that no such privilege as a dissent without cause was either claimed for, or conferred on the congregation at the time of the Revolution ; so that in fact the historical deduction therefrom is complete, that no such right existed in the people from the establishment of presbytery down to the passing of the act 1690,

But the subsequent act in the statute book (1711, c. 12,) concerning patronages, as contrasted with the act 1690, humbly appears to me, and I believe the same remark has been already made by some of your Lordships, to be quite decisive as to the absolute extinction of Calls. The act 1690 had authorized and established a Call of a very peculiar nature, and of a comparatively limited extent. The congregation were called on to disapprove and to give in their *reasons* to the presbytery ; but even that way of calling ministers, to use the very words of the act, was found to occasion great heats and divisions, and therefore the act 1690 was repealed and made void, and it was provided that in all time coming, the right of all and every patron to the presentation of ministers to Churches and benefices, and the disposing of vacant stipends for pious uses within the parish, be restored, settled, and confirmed to them, the aforesaid acts or any other act, statute, or custom to the contrary, in anywise notwithstanding ; and the clause goes on to provide, that “ the presbytery of the respective bounds shall “ and is hereby *obliged to receive and admit* in the same manner, “ such qualified person or persons, minister, or ministers, as shall “ be presented by their respective patrons, as the persons or ministers, presented before the making of this act, ought to have been “ admitted.”

Now this statute directly abolished the only Call which the Kirk had any right to enforce, prior to its date. On this subject I think it of the utmost importance that we should understand clearly what was the procedure under the act 1690. When, therefore, that statute was in force, and when a minister had been nominated by heritors and elders to the congregation, and when the latter had concurred in a call to the nominee, the presentment of that individual to the presbytery was complete. No farther reference was made by the presbytery to the Congregation respecting the settlement of the minister, unless perhaps, that on serving the Edict, any person might even then object as for cause. Such having been the procedure under the act 1690,—the plain and obvious effect of the act 1711, was to abolish every form of Call. The ancient patron was substituted in place of the heritors and elders ; the form of proposing to the Congregation, esta-

blished by 1690 was, along with the whole of that act, repealed ; and it was enacted that the presbytery should be bound and obliged to receive and admit such qualified person as should be presented, “ as the persons or ministers presented before the “ passing of this act, ought to have been admitted.”

Thus a presentee of the patron was placed on the exact footing of the presentee of the heritors, elders, and congregation, before the making of the act. A person under the act of 1690 was presented to the presbytery, by nomination and call. Under the act of 1711 he was presented by deed of the patron. The latter statute declared the presbytery bound and obliged to proceed with the admission of the patron's presentee, as they would have proceeded with a presentee whose nomination was complete under the previous statute ; and as no form of call was thereafter resorted to under the preceding law, it was utterly incompetent under the new.

With the greatest deference, the view of the provision of the act 1711, taken by some of your Lordships who have last spoken, seems to me liable to the greatest question. When it is provided by the act of 1711, that the ministers afterwards presented by the patron shall be received and admitted as ministers presented before the making of this act ought to have been admitted, it would, as I conceive, be contrary to the plainest construction of that act, to hold that the patrons just came in room of the heritors and elders, and that the minister was still to be proposed to the congregation. Instead of remedying, that would just have perpetuated, the way of calling ministers, which had created the heats and animosities that the statute was intended in future to put an end to. The heats and animosities did not arise, and are not alleged to have arisen, between heritors and elders, but in the mode of calling the minister before the congregation,—a practice then expressly repealed.

This, however, being the positive enactment of the statute of 1711,—of a British statute which never goes into desuetude, and which is in daily observance, it would be very extraordinary indeed if the Church courts could of their own authority, make any regulation directly to repeal, or in any material respect to abridge the civil rights expressly given to parties by that statute. No doubt the church courts, following the course of their predecessors of old, still kept up the form of Calls as a protestation against the civil law, which they were unwilling to recognise and obey ; but though the people of Scotland were most naturally and justly incensed at the manner in which even the limited right of control enjoyed by them in the examination of ministers was taken away by the act of 1711, it was never in any one instance seriously maintained in the Civil court, that the right of patronage could be

restrained, either by the old form of call, which was expressly repealed by the last act, or by any new form of call which the church might attempt to introduce in the face of the statute.

At the same time, the fact can admit of no dispute, that some examples are to be found in the records of our provincial presbyteries and synods, especially after the re-establishment of patronage in 1711, in which presentations were rejected because a *bona fide* call was not produced from a greater or less proportion of the congregation. This was well explained by Lord Medwyn. In the very critical political state of the country after 1711, when the two rebellions of 1715 and 1745 broke out in Scotland, patrons were indisposed, and often found it difficult to carry their civil rights into effect. If that consideration, however, shewed any thing, it would rather go to prove, that the whole act of 1711 was for a time disregarded and disobeyed in Scotland, and not that calls were held to be compatible with its subsistence. The very history of the grievous complaints made, and of the bold and incessant struggles maintained by the Kirk and her sons against patronage, for many years after 1711, all appear to me to be so many decisive proofs, that the whole community in Scotland, lay and ecclesiastical, held, that they had no legitimate and recognised power to restrain the right of patronage by the exaction of Calls.

If the kirk had power in their own hand, to make the consent or call of a majority of the congregation sufficient to control the exercise of patronage, could it ever have been a grievance which would have pressed heavily on the people? Would they not constantly have had redress in their own hands? If a presentation by lay patrons required the sanction of a Call, patronage could never have been *greatly abused*, as the preamble of the act 1690 sets forth. On the other hand, the people of Scotland could never have suffered any injury from the restoration of patronage, by the subsequent statute of 1711, if the church had a legal power to require a Call in favour of presentees, by a majority of the congregation.

But instead of taking any such view of the law, it is only necessary to look back to any chronicle of the times, as well as to the records of the kirk itself, to observe in what manner they understood the act of 1711. They not only sent a deputation of their most eminent divines to London, to oppose the act, but nearly the whole presbyteries, from Dornock to Dumfries, raised their voice against the law. These facts were so fully brought out by Lord Medwyn, that it would be improper for me to enlarge on them; but the inference deducible from them humbly appears to me to be irresistible. Accordingly, Mr. Dunlop, in his *Treatise on Patronage*, published before the present question

arose, gave the following striking picture of the state of the practice as to Calls in our own time. "The presbytery," says he, "hold the Call to be sufficient, *however few signatures may be attached to it*; and indeed, on the principles at present held on the subject, *the total absence of any signatures*, or of any substitute for such, would scarcely seem a sufficient ground for not proceeding with the settlement, since the moderating in a call is said to be considered as merely affording the people an opportunity of encouraging the labours of their future minister, by addressing to him this invitation." It is obvious, that while the mere empty form of a Call was gone through in this fashion, no patron was interested in objecting to it; and therefore if the continuance of such an usage for two centuries, could be established, I should hold it quite immaterial in the present inquiry.

It now remains to inquire under this head, on what ground it was, that under the settled and acknowledged state of the law, both civil and ecclesiastical, as now exhibited, the pursuer's presentation was rejected *without trial*, and *without cause*, in 1834?

Had this rejection proceeded from any presbytery in Scotland, at their own hand, and on their own motive alone, at any time between 1712 and 1834; and had the presentee appealed to the civil court, it humbly appears to me that the court would not have hesitated to declare the illegality of the rejection, and to have followed the declaration with interdict, retention of the vacant stipend, and possibly by damages in case of a continued and wilful disregard of the law, adequate to the injury of the party.

But the presbytery have here pleaded in defence, the order of a Supreme court. They say that by the interim act of 1834, they were bound to revive the call in a very different, and far more stringent form, than had been known in Scotland, either since 1711, or at any prior period; and they plead this act as justifying their rejection of the presentee in this case without trial.

This, of course, brings what has been called the *Veto* act of the General Assembly directly and unavoidably before us. It is pleaded in justification of what the pursuers set forth in the libel as an illegal proceeding. If, therefore, the act of Assembly of 1834 be legal and within the powers of the Assembly, the defenders are entitled to have their plea sustained. If it be not, then a defence founded on an incompetent and unlawful mandate of superiors, can never protect the defenders, at least to the limited effect to which the judgment is at present asked.

Before saying one word, however, as to the late law of the church, I must be excused for earnestly entreating that in any remark which I may offer upon it, I may not be misunderstood. Knowing that this law had the warm support of my learned bro-

ther near me, (Lord Moncrieff) as a member of the Assembly, it would ill become me either to speak slightly of its provisions, or even to express, with any confidence, an opinion against a measure which has had his high sanction. I wish, therefore, in all sincerity, and in the strongest terms which words can convey, to express any perfect conviction that this law received the support of my learned friend from an ardent attachment to that church and its faith, of which he and his illustrious father have long been the most powerful champions, and from an anxious wish to preserve as much of the just rights of patrons as he thought could be retained, amidst the various attacks, to which he then conceived them to be exposed. But my learned friend stated, with the candour which all who know him expected, that in supporting the new regulation as a member of the church court, he reserved full liberty to himself as a Judge, if it were ever questioned, to consider the objections in point of law which might be urged against it; and I am well assured that he will readily concede to others, the same freedom which he reserved to himself; and under this persuasion I am relieved from any embarrassment in entering on the consideration of the legal merits, of the regulation in question.

The objection then which appears to me as insurmountable to the Veto act, is, that it was a direct encroachment on, if not an entire annihilation of the civil rights of the patron, as constituted by statute. It virtually attached a condition to the operation of presentations, which the statute not only did not authorise, but which the civil statute excluded, by the repeal of the former law; and hence the Act of Assembly humbly appears to me, have been a manifest excess of power on the part of the Kirk.

According to my view of this case, it does not require any long or laboured commentary to illustrate this proposition. The Civil statutes have enacted in the most express terms, that the presbytery shall be bound to receive and admit any *qualified* person who is presented by the patron; the kirk enact in substance that no presentee shall be received who has a presentation, to which a certain class of third parties (viz. the larger part of the heads of families in the parish,) shall object. Is it not self-evident on the mere statement of the case, that the one law is an entire abrogation of the other?

This would have been sufficiently manifest had the presbytery provided in express words that they would not receive the presentation of any patron, unless it was laid on their table accompanied by the consent of other specified parties not authorized by the civil statutes; but the Act of Assembly effects the same object, when it provided, that after presentations were laid before them, it should be competent to presbyteries to receive objections

without cause, from a majority of heads of families, and upon such objections to decline to receive and admit the presentees.

The incompetency of this law, is the more striking, as it gives a part of the congregation of each parish in Scotland a larger and far more wide and irresponsible control over the nomination of ministers, than was conferred on them by the act of Parliament in 1690, and repealed by the act of 1711. In 1690 the congregations, when a presentation was exhibited to them, were, no doubt, allowed to object, but only on cause shewn; and they were obliged to state their *reasons* of disapprobation to the presbytery. By 1711 that privilege conferred on congregations was expressly repealed and taken away. But the act of Assembly in 1834, of its own authority, restores to heads of families a larger and more irresponsible power; and their simple dissent without reason assigned, is sufficient to quash the presentation.

It humbly appears to me, that this was a direct and unprecedented interference by the church, with a right specifically secured by statutes of the Civil legislature; and if sanctioned by courts of law, it might give rise to encroachments in other instances, the extent and consequences of which no one can foresee. Indeed, I am unable to resist the conclusion, that it falls precisely within the rule, admitted by the defenders themselves in argument, to constitute the liability of the defenders. It was both *ultra vires* of the church courts, and was a direct and not an incidental or collateral encroachment on the civil rights of the patrons.

The defenders no doubt deny this conclusion, and their whole case is based on this assumption—that the Call is a part of an ecclesiastical process,—that it is one of the regular steps towards induction; and so may be settled, altered, and modified as the Supreme ecclesiastical assembly may think fit, without any competent appeal to the civil court.

But I do not conceive that this plea is either relevant in itself, or well founded in fact.

In the first place, even if the Call were solely an ecclesiastical proceeding, I should not hold, that it could competently or fairly be enforced to the effect of enabling them to evade the express conditions of the Statute, under which the present system of church government itself was established. The Kirk could not, any more than a private party, do that *per ambages*, and under the disguise of an ecclesiastical regulation, which they could not do directly in their deliberative or administrative capacity. The adage *plus valet quod agitur quam quod simulate concipitur*, must apply to public bodies as well as to individuals, in order to protect statutory rights from violation; and therefore, when the patron's right is attempted to be rescinded or restricted by a new

ecclesiastical law restoring Calls, the act is not the less incompetent or unlawful, because the encroachment is accomplished, by means of a new rule introduced into an ecclesiastical process.

The contrary doctrine would lead to this, that the Kirk might, on the day after the act 1711 passed, have enacted, that the sort of Call proposed in the First Book of Discipline should be renewed and enforced. The colour given to such an invasion of right, by calling it an ecclesiastical process, could never, it is supposed, have misled any court of justice.

Neither does it appear any sound answer to the objection now urged, to say, that a patron's right may often be encroached on by regulations of the church courts which will affect the rights of patrons, and narrow their choice of presentees;—as exemplified in the case of pluralities restrained and prohibited by the church; and in the other analogous case of a higher and advancing standard of education, required under authority of the church, in candidates and presentees to the ministry. The distinction between these cases and the present is obvious. In the illustrations put, any additional burden or disadvantage to which patrons and presentees are exposed, is merely *incidental* and *indirect*. It also flows necessarily from the exercise of those powers, which the statute has expressly conferred on the church courts, as to the trial and admission of ministers. Everything done by the church, *bona fide* in the exercise of such powers, is unchallengeable.

Accordingly, as the world advances, the standard of qualification, in point of literature, sacred and profane, or of scientific attainments when qualification depends on these, must be greatly raised. The most ample scope, however, to try all the accomplishments of presentees, is embraced within the power given to the church to see that the presentee is duly “qualified;” and the church has exercised this power since the time of the *Regiam Majestatem* to the present day. It may possibly afford matter of declamation to some, and of derision to others, that every test should be legally applicable to a candidate for a cure, except his acceptability to the people, which has been repeatedly spoken of in the course of our present deliberations, as the best criterion of his powers of edifying the people by teaching; but if there be any anomalies, in the ancient and legal construction of “qualification,” it is constantly to be recollected, that this is an imperfection, common to the greater part of the countries in Christendom. And if the history of the church were ransacked, probably many instances would be found, in which the people shewed themselves very inadequate judges at first, on the very short trial allowed them under any form, to appreciate the merits of those teachers who ultimately proved their best moral and religious instructors.

But as observed before, no plea as to qualification arises proper-

ly in this case, where the record shews, that the defenders rejected the presentee, and refused to take any trial of his qualifications. At the same time, with regard to the case of *pluralities*, I must desire to express myself with all due caution. I am not aware that the power of the kirk to make laws on this subject has ever been regularly tried. In England it is believed, that the law of plurality is all regulated by statutes of the civil legislature; and if it shall ever be found on discussion of the case, that church courts in Scotland have any jurisdiction in matters of plurality, it must be on the ground that the earlier civil statutes relative to the affairs of the church, imply a direct prohibition on the ministers of the gospel to enjoy any other benefice, or exercise any other employment, than the cure of souls committed to their charge. At all events, there is no Civil statute directly entitling a presentee to combine another office, clerical or lay, with his parochial benefice. If there had, and if the act had been rescinded or disregarded by the Kirk at their own hand, it might have afforded some precedent for the present case.

But in the next place, though it has hitherto been assumed, that the Call given by presbyteries to parishioners, is a mere *ecclesiastical* proceeding, it is by no means clear to me, that it is entitled to be so viewed. At least if it be so, it was an ecclesiastical proceeding under the control of the civil power. It will be recollected, that the power of the congregation to appear at Calls, was first publicly promulgated and recognised by an act of the Civil legislature in 1690. So far, the Call was not at least of ecclesiastical authority. It seems merely to have been a proceeding to ascertain the wishes or concurrence of the parishioners, which derived its efficacy from the Civil Power. But the same legislature which conferred that power, took it away in 1711; and the Kirk virtually acquiesced for 120 years in its rescindment. After the best reflection which I have had it in any power to bestow on the case, I cannot come to the conclusion, that the kirk could of their own authority, and on this most important point, restore to the people, that right of concurrence, which the Legislature took away.

It is possible that I may view this question more with the eye and feelings of a civil lawyer, than an ecclesiastic; but I wish to preserve the strictest impartiality in considering the legal rights of the parties. On general principles of law it humbly appears to me, that the act of Assembly 1834, as affecting the very constitution of the whole ecclesiastical body, by changing the mode of electing a large portion of its constituent members, particularly required the authority of the Civil legislature. The State gave large provisions and endowments to the church, while it enacted expressly by successive statutes, that its ministers should be named by the

ancient patrons. But it seems to me to be contrary to every principle of civil and constitutional law, that an alteration in the very composition and constituent elements of this Body, should be competent, by any authority, short of the Civil legislature, by which the body was originally recognised and established.

In every view, therefore, I am humbly of opinion that it was incompetent for the Church to attempt by a law of their own in 1834 to give any portion of the parishioners a right to negative without cause, a qualified presentee. And no party who has any statutory duty to perform in reference to presentations, was entitled to plead that act, to justify him in rejecting the presentation.

II. It is now necessary for me to consider, as shortly as possible, the second inquiry which arises in this case, which is, whether this court has any Jurisdiction, to entertain the present action? And I must own that this point of the case, upon the facts which I now think myself entitled to assume, appears to me to require a far shorter discussion, than that with which I have been obliged to fatigue your Lordships, on the first point which has been already discussed.

It must now be held, on this part of the case, that the presbytery rejected the presentee without taking him on trial,—and that they did so, in obedience to a law, (no doubt of their own establishment), which is illegal, and contrary to the subsisting civil statutes of the realm,—and that the pursuers are thus deprived now, and till they get redress, of valuable patrimonial rights.

Hence I apprehend it, to be almost a self-evident proposition, that on every principle of law and justice, there must be redress for such a wrong, if those views which I have taken of the statutes, be correct. And though the precise form or mode of redress to be given to the injured parties, may depend on circumstances still to emerge, and contingent on the course of proceedings to be adopted by the parties, after a final decree in the declaratory branch of this action, shall be pronounced,—still, as the first and preliminary step to the pursuers' redress, whatever it may be, they are entitled to a decree, ascertaining the wrong, as prayed for, in terms of the declaratory conclusions of the summons.

The grounds on which I have come to this conclusion are obvious from my view of the pursuers' rights, already announced. Both pursuers appear to me to have been injured in their several rights, according to the facts set forth and proved on this record. The patron is injured, because he has given a presentation to another, which has been rejected, contrary to law; and which he cannot recal, if the presentee has not been legally rejected. The presentee, again, has been injured, if his presentation is wrong-

ously and unjustly delayed or rejected by the presbytery, who are bound and obliged to receive it.

Though the maxim may be very trite, it is not the less true and just, that there can be no wrong without a remedy. It would indeed be a singular doctrine, if the proprietors of such valued rights as church patronages, and the persons holding presentations from them, were the only parties who could be injured directly in their patrimonial rights, without redress in Scotland; and it would be equally strange, if the members of the ecclesiastical body, were the only public functionaries entrusted with the execution of statutes, who could violate the civil rights of others, without responsibility or control. Of course this is hardly contended for by any party, on the view of the law on which I proceed.

But if any remedy at all in any question be competent, it must be afforded by this court, as the only Supreme Court of civil jurisdiction in Scotland; and notwithstanding the many ingenious objections which have been urged, it still humbly appears to me, that an action of Declarator at the pursuers' instance, to have their respective wrongs found and declared, in terms of the first conclusion of the present amended summons, was the appropriate action for the present case; and was properly brought as a preliminary step to any farther redress which may be competent to the parties.

The rule and practice of the law of Scotland, in admitting declaratory actions, to enable parties to obtain the judgment of the Supreme court on questions of difficulty, necessary to be determined, in extricating their civil rights, has always been highly valued in our own country, and has obtained the admiration of lawyers under other systems. It may be allowed me, therefore, to quote a few short sentences, to shew the large class of cases to which they are applicable. Thus Lord Stair (585) says, "The Summons on actions declaratory are called declarators; and such actions may be pursued for instructing and clearing any kind of right relating to liberty, dominion, or *obligation*; but they use not to be raised or insisted on, where there is no complaint or pretence of any other right; yet parties may call any whom they please, the conclusion being to hear and see it found and declared, that the party had such a right; and if the parties cited please, they need not appear, if they conceive not themselves to have any pretence of right."

There has, perhaps, rarely been an instance, however, in which an action of declarator was more appropriately resorted to than in the present case. On the one hand, the proceeding of the presbytery, though illegal, (in my humble opinion) having been directed by a superior body of their own establishment, the inferior court were entitled to pause, till the law, if challenged, was ascertained by competent authority. If the proceeding was consistent

with law, then the defenders and the whole Kirk might act on it with confidence in future. If it was not legal, the church courts, and all interested, were entitled to know this from the highest authority, before any farther proceedings by the parties injured were instituted.

This action, however, though at present limited to the Declaratory conclusions of the libel, is held to be incompetent by some of your Lordships, whose opinion I highly respect, though I cannot concur in it. In particular, it is said to be objectionable, 1st, because it sets forth on its face an alleged error in an *ecclesiastical* cause or proceeding, cognizable only by the church court, and does not raise any question of civil right competent in this Court; and, 2d, because no mode of redress which this Court can authorize and enforce, is either indicated in the Summons, or conceivable in any event or to any effect, as competent against the present defenders.

1. As to the first objection, I have already adverted to it, and have little to add on this point. I cannot admit that the whole duty devolved on presbyteries, when they are obliged by statute to receive and admit qualified ministers is so purely of an ecclesiastical nature, that no neglect or refusal to fulfil it, will infer any civil responsibility; and one illustration, given in argument by some of your Lordships, has not yet been answered to my satisfaction even in the course of our present full deliberations.

Suppose, then, that the presbytery had advanced a step farther than they did upon the pursuer's presentation, and admitted him to trial, and found him *qualified*, but had thereafter rejected the presentation, on account of a dissent conveyed by the larger part of heads of families in the parish, would the pursuers have had no redress in that case? The pursuer would then have had evidence of qualification under the hand of the defenders, but would nevertheless have been denied his ulterior statutory right. Could a presbytery, however, be protected on any principle of law, from so plain a violation of an express enactment in a civil statute? It seems very hard indeed to understand the ground on which this can be maintained in any country where the Supremacy of the law is recognised.

No doubt, a vast variety of illustrations may be put of wrongs done and unjust sentences pronounced in ecclesiastical cases, which the civil court can never interfere with—ordinances may be unjustly withheld—censures may be oppressively pronounced;—in these, and in other analogous cases, the civil court has certainly no right to interfere; but these illustrations are inapplicable to the present case. There is no Civil statute which requires any church court to administer any of the ordinary solemn ordinances of religion to their flock. Hence, in all complaints as to these,

ministers are responsible only to their own ecclesiastical superiors ; and indeed it is obvious, that any pecuniary injury in such ecclesiastical causes, can only be collateral, remote, and contingent.

But where presbyteries are required by civil statutes to receive and admit ministers, whereby valuable civil rights accrue to them, if the reception and admission of the presentees, are contumaciously or on illegal grounds, withheld, I can never hold that this is exclusively an ecclesiastical cause, of which the civil court cannot take cognizance in any shape or to any effect. It humbly appears to me to be a proposition admitting of few exceptions, that where public functionaries are directed by civil statutes to do or perform particular public duties, and when these are not executed on grounds not sustainable in law, the parties thereby injured are entitled to declarator from the civil court declaring and ascertaining the breach of the statute.

2. But it is next said, that the present action is plainly incompetent, because no available redress can ever be given to the pursuers by any civil court, let the result of the present Declarator be what it may. If, however, the defenders feel any confidence in this view of the case, it would rather follow that they had the less interest to oppose the declarator ; but it certainly would be bold to predict, if such a declarator as that contained in the present summons is pronounced by this Court, and if that is ultimately affirmed by the House of Lords, that *no* means whatever will then be competent, according to the law of Scotland, of affording the parties injured any redress.

Even if it were found, on the ulterior discussion, that no reparation could be given to the presentee by the civil court, but that his proper redress would lie (as indicated by some of your Lordships) with Parliament, still this declarator would, even in that view, be proper. If any complaint were made to Parliament as to the operation of the law, might the pursuers not be fairly met by the reply, that they probably had a remedy in the Civil courts, and till that was ascertained, Parliament could not interfere. This is notoriously the answer made every day to parties complaining to the legislature of injustice or oppression from the operation of particular laws. It seems, therefore, to be a narrow and unsound view of the cases in which actions of declarator are sustained, to suppose, that they can only be entertained in cases, where the precise nature and measure of the ulterior remedy, can at the same time be accurately and minutely specified.

Farther, for aught yet shewn, this decree may be necessary to raise the question as to the *vacant stipend*, which has now accumulated in this parish for four years ; and it may also be necessary to enable the patron to ask an interdict against any ulterior

proceedings which might be adopted by the presbytery to fill up the vacancy, if they chose to follow out the other provisions of the act of Assembly of 1834. The patron was not bound to wait till the presbytery actually took steps for filling up the vacancy. The questions here agitated were too important to be discussed in the summary process of suspension. In this view alone, the process of declarator was proper, to ascertain the legality of the rejection of the first presentee.

No doubt it has been said that the retention by the patron of the vacant stipend is the *whole* remedy which the law of Scotland gives, when a presentee is unjustly and improperly rejected. Possibly this vacant stipend may be the amount and measure of the *patron's* pecuniary claims, but no authority has yet been adduced to shew, that a presentee must in all cases be excluded from patrimonial reparation. As the case strikes me at present, however, this is a question on which it would be premature to enter. If the presbytery shall be found to have acted right and agreeably to law, all farther question will of course be superseded; on the other hand, even if they acted wrong, and if the declarator be pronounced, as now asked, the measure or extent of the reparation competent to the presentee may depend on the future proceedings of the defenders, on which it would be at present alike superfluous and almost indecorous to speculate. The continued disregard of the law by the church court, as it may be finally pronounced by the highest judicature of the land, is hardly a contingency which it would be decent to anticipate.

But certainly I shall not shrink from declaring, that if the decree of declarator now asked, were affirmed in the high court of appeal, and if the presbytery, on that being intimated, still refused to receive and admit the presentee, if found “qualified” in what I conceive to be the legal sense of that term, nothing I have yet heard satisfies me, that *no* reparation would be claimable, on established principles of law, by the presentee, from those to whom his wrong is imputable. The presbytery may not be chargeable by horning to give specific impliment by induction, but as infringing a Civil statute from which great patrimonial loss has ensued, they will be subject to the hazard of a serious claim, *ad id quod interest*.

It was well observed already by one of your Lordships, that a sufficient number of cases arise in practice, in which pecuniary claims are competent against presbyteries if they persevere in wrong, to point out the course which a party might pursue, if the wrong is continued. The most obvious is that of their presentee attempting to retain a benefice when appointed before the *jus devolutum* arose in law. Though the presbytery may not be chargeable by horning to induct the proper presentee, or to divest the

wrong one, they would certainly be liable for the loss of the party excluded by their illegal act from the benefice.

As to the remark, that the responsibility of the presbytery in the present case might be shared with or devolved on the General Assembly, these extreme cases perhaps only serve to mislead us from the proper question before us. The presbytery are the parties directed by statute to receive and admit presentees; upon them the duty and responsibility devolve, and it cannot be shifted to other parties, in a question with the presentee. But truly it can never be supposed for a moment that a body of Divines at the head of the ecclesiastical establishment of the State, could resort to any device, after the law was declared, to obstruct a party in obtaining his right as that may be ultimately decided.

Neither has this been the course ever followed by presbyteries at any preceding period, when they mistook any statutory duty confided to them, and were directed by the supreme civil court to correct it. On the contrary, the case of Ramsay against the heritors of Corstorphine, 10th March 1812, is important as affording at least one example in modern times, in which a presbytery who had incompetently refused to proceed with a statutory duty, were directed by the supreme civil court forthwith to execute the statute, and take cognizance of the case. In that instance, if the presbytery had proceeded on the merits, there would have been no appeal to this court, but as they refused to take trial of a charge against a schoolmaster on an erroneous view of the law, the court corrected that mistake, and expressly ordained them to proceed in the execution of their statutory powers. It has been said that that judgment proceeded on the ground that there was no appeal to the supreme church courts; but this appears to me to be a mistake. Although on the merits, the highest church courts were as much excluded from review as this court, the parties probably might have appealed both to synod and Assembly, to the effect of getting the presbytery ordained to perform and execute this part of their official duty which they had refused. But that consideration did not exclude the jurisdiction of this Court, and it was accordingly found that this Court had jurisdiction, "if the presbytery refuse to act, or exceed their powers."

I am aware that the presbytery there were not made parties by action of declarator, as in the present instance,—but that an appeal was taken to this Court, in the form of advocacy, by the heritors against the schoolmaster. But while the shape of that case admitted of a different form of review, from that which is practicable here, it is sufficient to reply that the presbytery, in the present instance, not only from their being the ministerial functionaries appointed to execute the statute, but from their own contingent interest in the next presentation, if it has fallen *jure*

devoluto, appear to me to be competently made parties in the present declarator.

I do not feel myself entitled to enter on the earlier cases which have all been oftener than once explained by the Judges who have preceded me. While I concur with Lord Jeffrey that none of them came before this Court in the same stage, or under the same circumstances as the present, I think they nevertheless afford sufficient authority to support the present action. It seems hardly to be disputable, that if the presbytery had proceeded to carry the act of Assembly to any ulterior effect after rejecting the presentee, as for example, by attempting to execute the 16th and 17th sections of the act, then in conformity with the case of Nicolson, and many prior cases, the pursuers might competently have brought the presbytery into the field. But I am unable to see any ground or principle of law on which the pursuers were bound to postpone the declarator of their right, till something more was done by the presbytery, under a law which the pursuers did not recognize, to interfere with the first valid presentation laid before the presbytery. Even on the argument of the defenders themselves, it is incontestible, that if the presentation to the pursuer here, has been illegally and incompetently rejected, his right still subsists. The defenders have never, throughout the whole of the present proceedings, said that they *bona fide* do not intend to proceed farther, under the act of Assembly, with the settlement of this parish. While the one party, therefore, has a manifest interest to proceed with the declarator, I do not think that the other has any fair or intelligible ground to resist it, unless the defenders could allege, that they actually mean to keep the parish of Auchterarder in a state of *perpetual vacancy*, which, of course, is an imputation the defenders will never admit to be attachable to themselves.

With regard to the cases before the church-courts since 1711, I think that as authorities in opposition to the civil statute, they are of no value. They truly go no farther than the act of Assembly in 1736 and 1782, which appear never to have been acted on, in any cases where the parties were disposed, or could afford to assert their legal rights. But these were mere declarations by the Kirk, as to what they conceived to be their own law, in opposition to statutes which must be respected by this Court. Accordingly, other resolutions than those referred to by the defenders, were passed by the General Assembly in 1736, (which are said to have been drawn by the first President Arniston,) and were framed in terms, which seem to me to amount to a public admission, that the Church had not the means by any exercise of powers belonging to themselves, to correct the grievance of patronage. The resolution concluded thus :—"As the grievous consequences of presentations have since that time increased, and are felt very sen-

“sibly in many parts of this Church, it was justly thought necessary lately to renew applications to his Majesty; and we think it still most just and fit, upon the first favourable occasion that the providence of God shall offer, humbly to apply to his Majesty and the Parliament for redress of this grievance, being hopeful that the same may be successful, when we shall have full access to represent the necessity of the case, and particularly that this grievance was brought upon us contrary to the establishment of this Church made at the glorious Revolution, and solemnly confirmed and secured as an *essential condition* of the *Union* of the two kingdoms.”

That remonstrance was plainly tantamount to a declaration, that whatever was the ancient Church law, qualified presentees at least under the act 1711, had a legal right to settlements, if they chose to enforce them, without any control by the congregations.

The Church has now, after a century's acquiescence in these views, taken a different view of her powers,—and the question is, If this Court has any jurisdiction to enforce or protect the rights of parties constituted by a subsisting civil statute? Upon established principles of law, I think the Court must have jurisdiction, as I see no other mode, so proper and convenient for extricating the civil rights of parties constituted by express statute, as by entertaining the action of declarator now before us. If our opinion is wrong, it will be corrected by a superior Court; if well founded, I can never suppose that a Church established and supported by the State, will resist the law, when declared by the highest authority competent to adjudge it.

Thursday, March 8.

THE LORD PRESIDENT.—My Lord Glenlee, as you were not present, except when delivering your own opinion, it is proper to me to state to your Lordship, that Lords Fullerton, Moncreiff, Jeffrey and Cockburn, concurred in that opinion, whilst the other judges, forming a majority of the Court, adopted the opinion of the Lord Justice Clerk and myself. I therefore now propose to pronounce judgment in terms of the opinion of the majority of the Court.

THE SOLICITOR GENERAL.—My Lord President, before the Court pronounce judgment, I have, on the part of the Presbytery of Auchterarder,—in reference to the opinions expressed by some of your Lordships on the question of homologation by the pursuer of the proceedings of the presbytery—to crave the Court, of consent of the Dean of Faculty, to allow the following Plea in defence to be added to the Record. With your Lordship's permission, I shall read it. It is as follows:—"The pursuers are barred by acquiescence from objecting to the proceedings of the presbytery of Auchterarder, and pleading that the same were illegal."

A Minute having been given in, in terms of this motion, an Interlocutor was pronounced, by which the Lords "of consent of parties, allow the above Plea in defence to be added to the Record."

The Court accordingly, by a majority of eight to five pronounced the following judgment.—

Edinburgh, March 8, 1838.

' The Lords of the First Division having considered the cases
' for the Earl of Kinnoull and the Reverend Robert Young, and
' for the Presbytery of Auchterarder, with the Record and produc-
' tions, and additional plea in defence admitted to the Record, and
' heard counsel for the said parties at great length, in presence of
' the Judges of the Second Division and Lords Ordinary, and
' having heard the opinions of the said Judges ; They, in terms of

‘ the opinions of the majority of the Judges, repel the objections
 ‘ to the jurisdiction of the Court, and to the competency of the
 ‘ action as directed against the Presbytery : Further, repel the
 ‘ plea, in defence, of acquiescence : Find, that the Earl of Kin-
 ‘ noull has legally, validly, and effectually exercised his right, as
 ‘ patron of the church and parish of Auchterarder, by presenting
 ‘ the pursuer, the said Robert Young, to the said church and
 ‘ parish : Find, that the defenders, the Presbytery of Auchter-
 ‘ arder, did refuse, and continue to refuse, to take trial of the
 ‘ qualifications of the said Robert Young, and have rejected him
 ‘ as presentee to the said church and parish, on the sole ground
 ‘ (as they admit on the Record), that a majority of the male heads
 ‘ of families, communicants in the said parish, have dissented,
 ‘ without any reason assigned from his admission as minister :
 ‘ Find, that the said Presbytery in so doing have acted to the
 ‘ hurt and prejudice of the said pursuers, illegally, and in viola-
 ‘ tion of their duty, and contrary to the provisions of certain
 ‘ statutes libelled on, and, in particular, contrary to the provi-
 ‘ sions of the statute of 10 Anne, c. 12, entituled “ an act to
 ‘ restore patrons to their ancient rights of presenting ministers to
 ‘ the churches vacant in that part of Great Britain called Scot-
 ‘ land ;” in so far repel the defences stated on the part of the
 ‘ Presbytery, and decern and declare accordingly : and allow the
 ‘ above decree to go out and be extracted as an interim decree ;
 ‘ and with these findings and declarations, remit the process to
 ‘ the Lord Ordinary to proceed further therein as he shall see
 ‘ just.

(Signed 10th March,)

C. HOPE, *I. P. D.*

APPENDIX

OF

ACTS OF PARLIAMENT REFERRED TO.

No. I.—Act 1567, c. 6.

Anent the trew and haly Kirk, and them that ar declared not to be of the samin.

[As corrected and re-enacted by Act 1579, c. 68.]

OUR Sovereine Lord, with advise of his three Estaites, and hail bodie of this present Parliament, hes declared and declaris the Ministers of the blissed Evangel of Jesus Christ, quhome God in his mercie hes now raised up amangs us, or heirafter sall raise, agreeing with them that now lives, in doctrine and administration of the Sacraments, and the peopil of the Realme that professis Christ, as he is now offered in his Evangel, and dois communicate with the halie Sacraments (as in the reformed Kirkes of this Realme ar publicklie administrate,) according to the confession of the faith, to be the trew and halie Kirk of Jesus Christ, within this Realme, and decernis and declaris, that all and sindrie, quha outhir gainsayis the word of the Evangel, received and appreved ; As the heads of the Confession of the faith, professed in Parliament of befor, in the zeir of God, 1560 zeiris: As alsua specified and Registrat in the actes of Parliament, maid in the first zeir of his Heinesses Reigne, mair particularlie dois expresse, ratified alsua and appreved in this present Parliament ; Or that refusis the participation of the halie Sacraments, as they ar now ministrat ; to be na members of the said Kirk, within this Realme, and trew Religion, now presently professed. Sa lang as they keip themselves sa divided, from the societie of Christ's body.

No 2.—Act 1567, c. 7.

Admissioun of Ministers : Of laick Patronages.

Item, It is statute, and ordained by our Sovereine Lord, with advise of his dearest Regent, and three Estaitis of this present Parliament, that the examination and admission of Ministers, within this Realme, be only in the power of the Kirk, now openlie, and publickly professed within the samin. The presentation of laick Patronages alwaies reserved to the Just and auncient Patrones. And that the Patroun present ane qualified persoun, within sex Monethes (after it may cum to his knowledge, of the decease of him, quha bruiked the Benefice of before) to the Superintendent of thay partis, quhar the Benefice lyes, or uthers havand commission of the Kirk to that effect ; utherswaies the Kirk to have power to dispone the samin to ane qualified person for that time.

Providing that in caice the Patron present ane person qualified to his understanding, and failzeing of ane, ane uther within the said six Moneths, and the said Superintendent or Commissioner of the Kirk, refusis to receive and admit the person presented be the Patron, as said is: It sall be lesum to the Patron to appeale to the Superintendent, and Ministers of that province quhair the Benefice lyis, and desire the person presented to be admitted, quhilk gif they refuse, to appeale to the General Assemblie of the hail realme, be quhome the cause beand decyded, sall take end, as they decerne and declair.

No. 3.—Act 1578, c. 61.

The ratification of the libertie of the trew Kirk of God and Religion.

Our Sovereine Lord, with advise of his three Estaites of this present Parliament, hes ratified and appreved, and be the tenour heireof, ratifies and apprevis all and quhatsumever acts of Parliament, statutes, and constitutions past, and maid of befor, aggreable to God's word, for maintenance of the liberty of the trew Kirk of God and Religion, now presentlie professed within this Realme, and puritie theirow. And decernis and declaris the samin to have the effect in all poynts, after the forme and tenour theirow.

No. 4.—Act 1581, c. 99.

The ratification of the libertie of the trew Kirk of God and Religion, with confirmation of the Lawes and Actes maid to that effect of befor.

Our Sovereine Lord, with advise of his three Estaites and hail body of his present Parliament, hes ratified and appreved, and be the tenour heirow ratifies and apprevis, all quhatsumever Actes of Parliament, Statutes, and constitutiones, past and maid of befor, aggreable to God his word, for maintenance of the libertie of the trew Kirk of God and Religion, now presently professed within this Realme, and puritie theirow. And speciallie the Act maid in the reigne of the Queene, his dearest mother, in the Parliament halden at *Edinburgh*, the 19th day of April, the zeir of God 1567. Anent the cassing, annulling, and abrogating by all Lawes, Acts, and constitutiones, Canons Civile and Municipal, with uther constitutions contrair the Religion now professed within this Realme. And in likewise the Actes after following, maid in divers Parliaments, halden sen his Hienes' Coronation. Namelie, the Actes anent the abolishing of the *Paipe* and his usurped authoritie. Anent the annulling of the Actes of Parliament, maid against God his word, and maintenance of Idolatrie in any times bypast. The Confession of the Faith professed be the Protestantes of *Scotland*. Anent the Messe abolished, and punishing of all that hearis or sayis the same. Anent the trew and haly Kirk, and of them that are declared not to be of the same. Anent the admission of them that sall be presented to Benefices, havand cure of Ministrie. Anent the King's Aith to be given at his coronation. Anent them that suld beare publick Office hereafter. Anent thriddis of Benefices granted in the moneth of December, the zeir of God 1561 zeires, for sustein- ing of the Ministrie, and utheris affairs of the Prince. Anent them

that shall be teachers of the zouth in schools. Anent the jurisdiction of the Kirk. Anent the disposition of Provostries, Prebendries, and Chaplaineries to Bursares, to be founded in Colledges. Anent the filthy vice of Fornication, and punischment of the same. Anent them that committis Incest. Anent lawful Mariage of the awin blude in degries, not forbidden be God his word. Ratification and approbation of the Actes and statutes maid of befor, anent the freidome and libertie of the trew Kirk of God. Anent the trew and hailie Kirk. That the Adversaries of Christ Evangel sall not enjoy the Patrimonie of the Kirk. Anent the disobedientes, quhilk sall be received to our Sovereine Lord is mercie and pardon. The explanation of the Act maid anent manses and glebes. Anent purchessing of the Paipe's Bulles, or giftes of the Queene, our Sovereine Lordis mother. Approbation of the Act maid anent the disposition of Benefices to the ministers of Christis Evangel. Anent the reparation of Paroche Kirkis. The ratification of the libertie of the trew Kirk of God and Religion. That the Glebes of the Ministers and Readers sall be free of tenydes. Anent the trew and hailie Kirk, and of them that are declared not to be of the same. Anent the jurisdiction of the Kirk, dischargeing of Mercates, and labouring on the Sabboth dayes, and playing or drinking in time of Sermone. Anent the zouth, and uthers bezond Sey, suspect to have declined from the trewe religion. That householderis have Bibles and Psalme buikes. For punischment of strang and idle beggars, and releife of the pure and impotent. And declaris the saidis Actes, and everie anc of them, and all utheris actes of Parliament, maid in favours of the trew Religion, sen the said Reformation, to have effect in all poyntes, after the forme and tenoir theirrof.

No. 5.—Act 1584, c. 129.

Ane Act confirming the Kingis Majesties Royal power over all Estaites, and subjectes within this Realme.

Forsameikle as sum persones, being lately called befor the Kings Majestie, and his secret Council: to answer upon certaine points to have bene inquired of them, concerning sum treasonable, seditious, and contumelious speeches, uttered by them in Pulpit, Schooles, and utherwaies, to the disdaine and reproch of his Hienes, his Progenitours, and present Council, contemptuously declined the judgement of his Hienes, and his said Council in that behalfe, to the evil exampil of utheris to do the like, gif timous remeede be not provided. Therefor our Sovereine Lord, and his three Estaites assembled in this present Parliament, ratifies and appreis, and perpetually confirmis the royal power, and autoritie over all Estaites, alsweil Spiritual, as Temporal, within this Realme, in the person of the Kingis Majestie, our Sovereine Lord, his aires and successours: And als statutis and ordainis, that his Hienes, his saidis aires and successours, be themselves, and their councelles, ar, and in time to cum sall be judges competent to all persones his Hienes subjectes, of quhatsumever estaite, degree, function, or condition that ever they be of, Spiritual or Temporal, in all matters, quhairin they, or ony of them sall be apprehended, sum-mound, or charged to answer to sik thinges as sall be inquired of

them, be our said Sovereine Lord and his Councel. And that nane of them, quhilkis sall happen to be apprehended, called, or summond, to the effect foirsaid, presume, or tak upon hand to decline the judgement of his Hienes, his aires and successours, or their Councel in the premisses, under the paine of treason.

No. 6.—Act 1584, c. 131.

Ane Act discharging all jurisdictions, and judgements, not approved be Parliament, and all Assemblies, and Conventiones, without our Sovereine Lordis special licence and commandement.

Forsameikle, as in the troublous times, during thir xxiiij zeires, by past, sindrie formes of judgements and jurisdictions, alsweil in Spiritual, as Temporal causes, ar entred in the practize and custome, quhairby the Kingis Majesties subjects ar often times convocat and assembled togidder, and paines alsweil civile and pecunial, as Ecclesiastical, injoined unto them; processes led and deduced; sentences, and decreetes given, and the same put in execution: Na sik ordour as zet, being allowed of, and approved be his Majestie, and his three Estaites in Parliament, contrare the custome observed in onie uther Christian Kingdome, or weill governed commoun weill; and to the diminishing of the force, and power of his Hienes awin lawes, be the quhilkis his Majesties subjects aucht to be ruled; and speciallie his Hienes and his Estaites, considering that in the saidis assemblies, certaine his subjectes have taken upon them to justifie, and auctorize the fact perpetrat against his Hienes person and Estate at *Ruthven*, and prosecuted thereafter, quhill his Majestie at Gods pleasure, recovered his liberties, having in their pretented maner, maid actes theirupon, kiepis the same in Register, and as zet seemis to allow the said attemptat, althocht now publicklie condemned be his Hienes and Estaites as treasonable, nane of the authors theirow, having craved his Hienes pardon theirfoir. For remeid quhairof, in time cumming, swa that according to the lovabil act of his dearest Grandsir, King James the Fourth, of worthie memorie, all his Hienes lieges (being under his obeysance) mon be ruled by his awin lawes, and the commoun lawes of this Realme, and be nane uther lawes: Our Sovereine Lord, and his three Estaites, in this present Parliament, dischargis all judgements, and jurisdictions, Spiritual or Temporal, accustomed to be used and execute, upon ony of his Hienes subjectes, quhilkis ar not approved be his Hienes, and his saidis three Estaites, convened in Parliament: and decernis the same to cease in time cumming, quhill the ordour thereof be first scene, and considered be his Hienes, and his saidis three Estaites convened in Parliament, and be allowed and ratified be them: Certifeing them, that sall proceed in using, and exercing of the saidis judgements, and jurisdictions, or in obeying of the same, not being allowed, and ratified, as said is: They sall be repute, halden, called, persewed, and punished as usurpers, and contemners of his Hienes autoritie, in exemple of utheris. And als it is statute and ordained, be our said Sovereine Lord, and his three Estaites, that nane of his Hienes subjectes, of whatsumever qualitie, estaite, or function they be of, Spiritual or Temporal, presume or tak

upon hand, to convocate, convene, or assemble themselves togidder, for halding of councelles, conventions, or assemblies, to treat, consult and determinat in ony matter of Estaite, Civile or Ecclesiastical, (except in the ordinar Judgement) without his Majesties special commandement, or expresse licence, had and obtained to that effect, under the paines ordained be the lawes and actes of Parliament, against sik as unlawfully convocatis the Kingis lieges.

No. 7.—Act 1584, c. 132.

The Causes and Maner of deprivation of Ministers.

Our Sovereine Lord, and his three Estaites, assembled in this present Parliament, willing that the word of God sall be preached, and Sacramentes administrat in puritie and sinceritie, and that the rentes, quaharon the Ministers aucht to be sustained, sall not be possessed be unworthie persones neglecting to do the duties, for whilkis they accepted their benefices, being utherwaies polluted with the frail and enorme crimes, and vices after specefied. It is therefor statute and ordained be his Hienes, with advice of the saidis three Estaites : That all Persones, Ministers or Readers, or utheris provided to benefices, sen his Hienes Coronation, (not having vote in his Hienes Parliament,) suspected culpable of heresie, papistrie, fals and erroneous doctrine, commoun blasphemie, fornication, commoun drunkennes, non-residence, plurality of benefices having cure, quhairunto they are provided sen the said Coronation, Simonie and dilapidation of the rentes of benefices, contrare the lait Act of Parliament, being lawfully, and ordourly called, tryed, and adjudged culpable, an the vices and causes above-written, or onie of them, be the ordinar Bishope of the diocese, or utheris the Kingis Majesties Commissioners to be constitute in Ecclesiastical causes, sall be deprived alsweil fra their function in the Ministrie ; as from their benefices, quhilkis sall be thereby declared to be vacand ; to be presented and conferred of new, as gif the persones possessors theirof, were naturally dead : And that it sall be esteemed, and judged non-residence, quhair the person being in the function of the ministry, provided to ane benefice, sen the Kingis Majesties Coronation makis not residence at his manse, gif he ony hes ; and failzieing thereof, at sum uther dwelling place within the parochin, bot remains absent theirfra, and from his Kirk, and using of his office, be the space of four Sabboth dayes in the haill zier without lauchful cause and impediment, allowed be his ordinar. And quhair ony person, is admitted to maa benefices, havand cure, sen our Sovereine Lordis Coronation, the acceptation of the last, sall be sufficient cause of deprivation from the remanent, swa that he be provided to twa, or maa benefices havand cure, sen the time of the said Coronation. And neverthesse this present act sail not extend to ony person, provided to his benefice befor the said Coronation, neither sall the bruiking of that office, quhairunto he was provided of befor, induce pluralitie of benefices in this case, bot he sall allanerly tine his richt of the benefice, quhairunto he was provided sen the said Coronation allanerly : And union of Kirks to ane benefice, not to be judged pluralitie, quhill farder ordour be established and provided in

that behalfe: Sike as alsua, the persones being in the function of the ministrie, that sall happen to be lawfullie and ordourly convict befor our Sovereine Lordis Justice-General, or utheris their Judges competent, of capital crimes, sik as treason, slauchter, mutilation, adulterie, incest, theft, commoun oppression, usurie against the lawes of this Realme, perjurie, or falsed: They being likewaies lawfullie and ordourlie deprived fra their function in the ministrie, be their ordinar, or the Kingis Commissioners in Ecclesiastical causes. The benefices possessed by the saidis persones to vaik, be reason of the said conviction, and deprivation. And this to have effect and execution, onlie for crimes, vices, faultes, and offenses, that sall happen to be committed after the dait heirop.

No. 8.—Act 1592, c. 116.

Ratification of the liberty of the trew Kirk: Of Generall and Synodal assemblie: Of Presbyteries: Of Discipline. All Laws of Idolatrie ar abrogate: Of presentation to benefices.

Our Sovereine Lord and Estaites of this present Parliament; following the lovabil and gude exemple of their Predecessours: Hes ratified and appreeved, and be the tenour of this present act, ratifies and appreis all liberties, priviledges, immunities and freedoms quhatsumever, given and granted be his Hienesse, his Regentes in his name, or onie of his Predecessours, to the trew and halie Kirk, presently established within this Realm; and declared in the first Act of his Hienesse Parliament, the twentie day of October, the zeir of God, ane thousand, five hundreth, three-scoir ninetene zieres: and all and whatsumever Acts of Parliament, and statutes maid of before, be his Hienesse, and his Regentes; anent the libertie and freedom of the said Kirk: And specially, the first Act of the Parliament, halden at *Edinburgh*, the twentie foure daie of October, the zeir of God, ane thousand, five hundreth, fourscore ane zieres, with the hail particular Acts there mentioned: Quhilk sall be als sufficient as gif the samin were here expressed. And all uther Acts of Parliament maid sensine, in favour of the trew Kirk; And siklike, ratifies and appreis, the general Assemblies appointed be the said Kirk: And declares, that it sall be lauchfull to the Kirk and Ministers every zeir at the least, and oftner *pro re nata* as occasion and necessity sall require, to hald and keepe general Assemblies: Providing that the Kingis Majesty, or his Commissioners with them to be appoynted, be his Hienesse, be present at ilk general Assemblie, before the dissolving thereof, nominate and appoynt time and place, quhen and quhair the nixt General Assemblie sall be halden: and in case naither his Majesty, nor his said Commissioners beis present for the time in that Toun, quhair the said general Assemblie beis halden: Then and in that case, it sall be lesum to the said general assemblie, be themselves, to nominate and appoynt time and place, quhair the next general assembly of the Kirk sall be keiped and halden, as they have bene in use to do thir times by past. And als ratifies and appreis, the Synodical and Provinciall Assemblies, to be halden be the said Kirk and Ministers, twise ilk zeir, as they have bene, and ar presently in use to do, within every Province of this Realme; and ratifies and ap-

previs the Presbyteries, and particular Sessiones, appoynted be the said Kirk, with the hail jurisdiction and discipline of the same Kirk, aggried upon be his Majesty in conference had be his Hienesse, with certain of the Ministers, conveened to that effect: of the quhilkes articles the tenour followes. MATERS to be entreated in Provincial Assemblies: Thir Assemblies ar constitute for weichtie maters, necessar to be entreated be mutual consent, and assistance of brethren, within the Province, as neede requiris. This Assemblie hes power to handle, ordour, and redresse, all things omitted or done amisse in the particular assemblies. It hes power to depose the office-bearers of that Province, for gude and just cause, deserving deprivation: And generally, thir assemblies hes the hail power of the particular Eldershippes, quhairof they are collected. MATERS to be entreated, in the Presbyteries. The power of the Presbyteries is to give diligent laboures in the boundes committed to their charge: That the Kirks be kepted in gude ordour, To enquire diligently of naughty and ungodly persons: And to travel to bring them in the way againe be admonition, or threatning of Gods judgements, or be corection. It appertaines to the Elderschippe, to take heede, that the word of God be purely preached within their boundes. The Sacraments richtly ministred, the Discipline interteined: And Ecclesiastical guddes uncorruptly distributed. It belangis to this kinde of Assemblies, to cause the ordinances maid be the Assemblies, Provincialles, nationals and generals, to bee kepted and put in execution, to make constitutions, quhilk concernis *to prepon* in the Kirk, for decent ordour, in the particular Kirk, quhair they governe; Providing that they alter na rules maid be the Provincial, or General Assemblies: And that they make the Provincial assemblies foresaids, privy of the rules that they sall make: And to abolish constitutions, tending to the hurt of the same. It hes power to excommunicate the obstinate, formal Proces being led, and dew interval of times observed. ANENT particular kirks, gif they be lauchfully ruled, be sufficient Ministry and Session. They have power and jurisdiction in their awin Congregations, in maters Ecclesiastical. And decernis and declairis the saids Assemblies, Presbyteries, and Sessiones, Jurisdiction and Discipline thereof foresaid, to be in all times cumming maist just, gude, and godly in the selfe, Notwithstanding of quhat-somever Statutes, Actes, Canone, Civill, or Municipal Lawes, made in the contrare. To the quhilkis and every one of them, thir prescutes sall make expresse derogation: And because there ar divers Actes of Parliament, maid in favour of the Papistical Kirke, tending to the prejudice of the liberty of the trew Kirk of God, presently professed within this Realme, jurisdiction and discipline thereof; Quhilk stands zit in the buikes of the Actes of Parliament, nocht abrogated nor annulled: Therefore his Hienesse, and Estaites foresaids, hes abrogated, cassed, and annulled, and be the tenour hereof, abrogatis, cassis and annullis all Actes of Parliament made by any of his Hienesse Predecessoires, for maintenance of superstition and idolatry, with all and quhat-somever Acts, Lawes and statutes, maid at any tyme, before the day and dait hereof, against the

liberty of the trew Kirk, Jurisdiction and discipline thereof, as the samin is used and exercised within this Realme.

And in speciall, that part of the Act of Parliament halden at *Strivling*, the fourth day of *November*, the zeir of god, ane thousand, four hundredth, fourty three zeirs, commaunding obedience to be giving to *Eugenius* the Paipe for the time: the Acte made be King James the *thrid*, in his Parliament halden at *Edinburgh* the twenty four day of *Februar*, The zeir of God, ane thousand, four hundredth, fourscore zeires. And all utheris actes quhairby the Paipis authority is established. The Acte of King James the *thrid*, in his Parliament halden at *Edinburgh*, the twenty day of *November*, the zeir of God, ane thousand, four hundredth, three score nine zeires, anent the Satterday, and uther vigiles to be halie dayes, from Evensang to Evensang.

ITEM, that part of the Act, maid be the *Queene Regent*, in the Parliament halden at *Edinburgh*, the first day of *Februar*: The zeir of God, ane thousand, five hundredth fifty-ane zeirs, giving special licence for holding of *Pasche* and *Zule*. ITEM, The Kingis Majesty, and Estaitis, foresaidis, declaris, that the 129 Acte of the Parliament halden at *Edinburgh*, the xxij day of *Maij*, the zeir of God, ane thousand, five hundredth, fourscore, four zeires, sall naways be prejudiciall, nor derogate ony thing to the privilege that God has given to the spirituall office-bearers in the Kirk, concerning heads of Religion, matters of Heresie, Excommunication, collation or deprivation of ministers, or ony siklike essentiall censours, speciallie grounded, and havand warrand of the Word of God. ITEM, Our Soveraine Lord, and Estaitis of Parliament foresaidis, abrogatis, cassis, and annullis, the Act of the same Parliament, halden at *Edinburgh*, the said zeir, ane thousand, five hundredth, fourscore four zeires, granting commission to Bischoppes, and utheris Judges, constitute in Ecclesiastical causes, to receive his Hienesse presentations to benefices, to give colation thereupon: and to put ordour in all causes Ecclesiasticall: quhilk his Majesty and Estates foresaidis, declaris to be expired in the selfe, and to be null in time cumming, and of nane avail, force nor effect. And therefore ordainis all presentations to Benefices, to be direct to the particular Presbyteries, in all time cumming: with full power to give colation thereupon; And to put ordour to all maters and causes Ecclesiasticall, within their boundes, according to the discipline of the Kirk: Providing the foresaidis Presbyteries be bound and astricted, to receive and admitt quhat-sumever qualified Minister, presented be his Majesty, or laick patrones.

No. 9.—Act 1592, c. 117.

Vnqualified persones being deprived, the benefice vaikis, and the Patron not presentand, the richt of presentation pertaines to the Presbytery, but prejudice of the tackes, set be the person deprived.

Our Soveraine Lord Considering the great abuses quhilkis ar laity croppen in the Kirk, throw the misbehaviour of sik persones, as ar provided to Ecclesiasticall functions: sik as Parsonages and Vicarages within ony parochin, and thereafter neglecting their charge, ather leave their cure, or els committis sik crimes, faultes, or enormities

that they are found worthy of the sentence of deprivation, ather before their awn Presbyterie, or else before the Synodall or Generall assemblies. Quhilk sentence is the lesse regarded be them, Because albeit they be deprived of their function and cure within the Kirk : zit they thinke they may bruike lawfully the profites and rentes of their saids benefices, enduring their life-rentes ; Notwithstanding the said sentence of deprivation : Therefore, our Soveraine Lord, with advice of the Staitis of this present Parliament, declaris, that all and quhatsumever sentences of deprivation, ather pronounced already, or that happenis to be pronounced hereafter, be ony Presbyterie, Synodall, or General assemblies, against ony Parson or Vicar, within their jurisdiction, provided sen his Hienesse Coronation : All Parsones, provided to Parsonages and Vicarages, quha hes voit in Parliament, secreit Councill, and Session, or provided thereto of auld, before the Kingis Coronation, (And Maister *George Young*, Arch-dean of *Saint Andrewes*, being specially excepted,) is, and sall be repute in all Judgements, ane just cause to seclude the person before provided, and then deprived from all profites, commodities, rentes and dewties of the said Parsonage and Vicarage, or benefice of Cure : And that ather by way of action, exception, or reply. And that the said sentence of deprivation, sall be ane sufficient cause to make the said Benefice to vaikie thereby. And the said sentence being extracted, and presented to the Patron, the said Patrone sall be bound to present ane qualified person of new to the Kirk, within the space of sex Moneths thereafter : And gif he failzie to do the same, the said Patrone shall tine the right of presentation, for that time allanerly : And the richt of presentation to be devolved in the handes of the Presbytery, within the quhilk benefice lies ; to the effect that they may dispone the same, and give collation thereof, to sik an qualified person as they sall think expedient. Providing allwayes, in case the Presbytery refuses to admit ony qualified Minister, presented to them be the Patrone : It sall be lauchfull to the Patrone, to reteine the hail frutes of the said Benefice in his awin handes. And furder, his Hienesse and Estaites foresaides, declairis, that the deprivation already pronounced, or to be pronounced, be ony Presbyterie, Synodall, or Generall assemblies, against ony of the Parsones or Vicars foresaid, sall na-ways hurt, or be prejudiciall to ony tackes, lawfully set be that Person deprived, before his deprivation, to quhatsumever persones.

No. 10.—Act 1690, c. 1.

Act Rescinding the First Act of the Second Parliament, 1669.
Our Soveraign Lord and Lady the King and Queen's Majesties, taking into their Consideration, that by the second Article of the Grievances presented to their Majesties, by the Estates of this Kingdom ; It is Declared, that the First Act of the second Parliament of King Charles the Second, entituled, *Act asserting his Majesty's Supremacy over all Persons and in all causes Ecclesiastical*, is inconsistent with the Establishment of the Church Government now desired, and ought to be abrogat. Therefore, Their Majesties, with Advice and Consent of the Estates of Parliament, do hereby Abrogat,

Rescind, and Annull the foresaid Act, and Declares the same in the Whole Heads, Articles, and Clauses thereof, to be of no force or effect in all time coming.

No. 11.—Act 1690, c. 5.

Act Ratifying the Confession of Faith, and Settling Presbyterian Church Government.

Our Sovereign Lord and Lady, the King and Queen's Majesties, and three Estates of Parliament, conceiving it to be their bound duty, after the great deliverance that God hath lately wrought for this Church and Kingdom, in the first place to settle and secure therein, the true Protestant religion, according to the truth of God's Word, as it hath of a long time been professed within this land: As also the government of Christ's Church within this nation, agreeable to the word of God, and most conducive to the advancement of true piety and godliness, and the establishing of peace and tranquillity within this realm; And that by an article of the claim of right, it is declared, That prelacy, and the superiority of any office in the church above presbyters, is, and hath been a great and unsupportable grievance and trouble to this nation, and contrary to the inclinations of the generality of the people ever since the Reformation, they having reformed from popery by presbyters, and therefore ought to be abolished: Likas, by an act of the last *Session* of this *Parliament*, prelacy is abolished; Therefore their Majesties, with advice and consent of the said three estates, do hereby revive, ratifie, and perpetually confirm, all laws, statutes and acts of Parliament, made against popery and papists, and for the maintenance and preservation of the true reformed Protestant religion, and for the true Church of Christ within this kingdom, in so far as they confirm the same, or are made in favours thereof. Likas, they, by these presents, ratifie and establish the Confession of Faith, now read in their presence; and voted and approved by them, as the publick and avowed confession of this Church containing the sum and substance of the doctrine of the Reformed Churches; (which Confession of Faith is subjoined to this present act.) As also they do establish, ratifie, and confirm the Presbyterian Church government and discipline; that is to say, the government of the Church by kirk-sessions, presbyteries, provincial synods, and general assemblies, ratified and established by the 114th act, Ja. 6. Parl. 12, anno 1592, intituled, *Ratification of the Liberty of the True Kirk, &c.*, and thereafter received by the general consent of this nation, to be the only government of Christ's Church within this kingdom; reviving, renewing, and confirming the foresaid act of Parliament, in the whole heads thereof, except that part of it relating to patronages, which is hereafter to be taken into consideration: And rescinding, annulling, and making void the acts of Parliament following, viz.; act anent Restitution of Bishops, Ja. 6, Parl. 18, cap. 2; act ratifying the acts of the Assembly, 1610, Ja. 6, Parl. 21, cap. 1; act anent the election of Archbishops and Bishops, Ja. 6, Parl. 22, cap. 1; act intituled, *Ratification of the Five Articles of the General Assembly at Perth*, Ja. 6, Parl. 23, cap. 1; act intituled, *For the*

Restitution and Re-establishment of the ancient government of the Church by Archbishops and Bishops, Ch. 2, Parl. 1, Sess. 2, act 1 ; anent the constitution of a National Synod, Ch. 2, Parl. 1, Sess. 3, act 5 ; act against such as refuse to depone against delinquents, Ch. 2, Parl. 2, Sess. 2, act 2 ; act intituled, Act acknowledging and asserting the right of succession to the Imperial Crown of Scotland, Ch. 2, Parl. 3, act 2 ; act intituled, Act anent religion and the test, Ch. 2, Parl. 3, act 6 ; with all other acts, laws, statutes, ordinances, and proclamations, and that in so far allanerly as the said acts, and others generally and particularly above-mentioned, are contrary or prejudicial to, inconsistent with, or derogatory from the Protestant religion and Presbyterian government now established ; and allowing and declaring that the Church government be established in the hands of, and exercised by, these Presbyterian ministers who were outed since the first of January, 1661, for non-conformity to prelacy, or not complying with the courses of the times ; and are now restored by the late act of Parliament, and such ministers and elders only as they have admitted or received, or shall hereafter admit or receive : And also that all the said Presbyterian ministers have, and shall have, right to the maintenance, rights, and other privileges by law provided, to the ministers of Christ's Church within this kingdom, as they are, or shall be, legally admitted to particular churches. Likeas, in pursuance of the premises, their Majesties do hereby appoint the first meeting of the General Assembly of this Church, as above established, to be at Edinburgh, the third Thursday of October next to come, in this instant year 1690. And because many conform ministers either have deserted, or were removed from preaching in their churches, preceding the thirteenth day of April 1689, and others were deprived for not giving obedience to the act of the Estates made in the said thirteenth of April 1689, intituled, Proclamation against the owning of the late King James, and appointing publick prayers for King William and Queen Mary : Therefore their Majesties, with advice and consent foresaid, do hereby declare all the churches, either deserted, or from which the conform ministers were removed or deprived as said is, to be vacant ; and that the Presbyterian ministers exercising their ministry within any of these paroches, (or where the last incumbent is dead,) by the desire or consent of the paroch, shall continue their possession, and have right to the benefices and stipends, according to their entry in the year 1689 ; and in time coming, ay, and while the Church, as now established, take further course therewith. And to the effect the disorders that have happened in this church may be redressed : their Majesties, with advice and consent foresaid, do hereby allow the general meeting, and representatives of the foresaid Presbyterian ministers and elders, in whose hands the exercise of the Church government is established, either by themselves, or by such ministers and elders as shall be appointed and authorized visitors by them, according to the custom and practice of Presbyterian government throughout the whole kingdom, and several parts thereof, to try and purge out all insufficient, negligent, scandalous, and erroneous ministers, by due course of ecclesiastical process and censures ; and likewise for

redressing all other Church disorders. And further, it is hereby provided, that whatsoever minister, being convened before the said general meeting and representatives of the Presbyterian ministers and elders, or the visitors to be appointed by them, shall either prove contumacious in not appearing, or be found guilty, and shall be therefore censured, whether by suspension or deposition, they shall *ipso facto* be suspended from, or deprived of their stipends and benefices.

No. 12.—Act 1690, c. 23.

Act concerning Patronages.

Our Sovereign Lord and Lady, the King and Queen's Majesties, considering, That the power of presenting ministers to vacant churches, of late exercised by patrons, hath been greatly abused, and is inconvenient to be continued in this realm, Do therefore, with the advice and consent of the Estates of Parliament, hereby discharge, cass, annull, and make void the foresaid power, heretofore exercised by any patron of presenting ministers to any kirk now vacant, or that shall hereafter happen to vaik within this kingdom, with all exercise of the said power: And also all rights, gifts and infestments, acts, statutes, and customs, in so far as they may be extended, or understood, to establish the said right of presentation; but prejudice always, of such ministers, as are duly entered by the foresaid presentations, (while in use,) their right to the manse, glebe, benefice, stipend, and other profits of their respective churches, as accords: And but prejudice to the patrons of their right to employ the vacant stipends on pious uses, within the respective paroches, except where the patron is Popish, in which case he is to employ the same on pious uses, by the advice and appointment of the presbytery; and in case the patron shall fail in applying the vacant stipend for the uses foresaid, that he shall lose his right of administration of the vacant stipend for that and the next vacancy, and the same shall be disposed on by the presbytery to the uses foresaid; excepting always the vacant stipends within the bounds of the synod of Argyle: And to the effect, the calling and entering ministers, in all time coming, may be orderly and regularly performed, their Majesties, with consent of the Estates of Parliament, Do statute and declare, That, in case of the vacancy of any particular church, and for supplying the same with a minister, the heritors of the said parish, (being Protestants,) and the elders, are to name and propose the person to the whole congregation, to be either approved or disapproved by them; and if they disapprove—That the disapprovers give in their reasons, to the effect the affair may be cognosed upon by the presbytery of the bounds, at whose judgment, and by whose determination, the calling and entry of a particular minister is to be ordered and concluded: And it is hereby enacted, That if application be not made by the eldership, and heritors of the paroch, to the presbytery, for the call and choice of a minister within the space of six months after the vacancy, that then the presbytery may proceed to provide the said parish, and plant a minister in the church, *tanquam jure devoluto*. It is always hereby declared, that this act shall be but prejudice of the calling of ministers to Royal Burghs by the Magistrates, Town-Council, and Kirk-Ses-

sion of the burgh, where there is no landward parish, as they have been in use before the year 1660. And where there is a considerable part of the paroch in landward, that the call shall be by Magistrates, Town-Council, Kirk-Session, and the heritors of the landward paroch. And in lieu and recompence of the said right of presentation, hereby taken away, their Majesties, with advice and consent foresaid, statute and ordain the Heritors and liferenters of each Paroch, and the Town-Councils for the Burgh, to pay the said Patrons, betwixt and Martinmas next, the sum of six hundred merks, &c. &c.

No. 13.—Act 10, Q. Anne, c. 12.—A.D. 1711.

An Act to restore the Patrons to their ancient Rights of presenting Ministers to the Churches vacant in that part of Great Britain called Scotland.

“Whereas by the antient laws and constitutions of that part of *Great Britain* called *Scotland*, the presenting of ministers to vacant churches did of right belong to the patrons, until by the twenty-third act of the second Session of the first Parliament of the late King William and Queen Mary, held in the year One thousand six hundred and ninety, intituled, *Act concerning Patronages*, the presentation was taken from the patrons, and given to the heritors and elders of the respective parishes; and in place of the right of presentation, the heritors and life-renters of every parish were to pay to the respective patrons a small and inconsiderable sum of money, for which the patrons were to renounce their right of presentation in all times thereafter: And whereas by the fifteenth act of the fifth Session, and by the thirteenth act of the sixth Session of the first Parliament of the said King William, the one intituled, *An act for encouraging of preachers at vacant churches benorth Forth*, and the other intituled, *Act in favour of preachers benorth Forth*; there are several burthens imposed upon vacant stipends, to the prejudice of the patron's right of disposing thereof: And whereas that way of calling ministers has proved inconvenient, and has not only occasioned great heats and divisions among those who by the aforesaid act were entitled and authorized to call ministers, but likewise has been a great hardship upon the patrons, whose predecessors had founded and endowed those churches, and who have not received payment or satisfaction for their right of patronage from the aforesaid heritors or life-renters of the respective parishes, nor have granted renunciations of their said rights on that account;” be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That the aforesaid act made in the year one thousand six hundred and ninety, intituled *Act concerning patronages* in so far as the same relates to the presentation of ministers by heritors and others therein mentioned, be and is hereby repealed and made void; and that the aforesaid fifteenth Act of the fifth Session, and thirteenth act of the sixth Session of the first Parliament of King William, be and are hereby likewise repealed and made void; and that in all time coming, the right of all and every patron or patrons to the presenta-

tion of ministers to churches and benefices, and the disposing of the vacant stipends for pious uses within the parish, be restored, settled, and confirmed to them, the aforesaid acts, or any other act, statute, or custom to the contrary in any wise notwithstanding ; and that from and after the first day of *May*, one thousand seven hundred and twelve, it shall and may be lawful for her Majesty, her heirs and successors, and for every other person or persons who have right to any patronage or patronages of any church or churches whatsoever, in that part of *Great Britain* called *Scotland*, (and who have not made and subscribed a formal renunciation thereof under their hands,) to present a qualified minister or ministers to any church or churches whereof they are patrons, which shall, after the said first day of *May*, happen to be vacant ; and the presbytery of the respective bounds, shall, and is hereby obliged to receive and admit in the same manner such qualified person or persons, minister or ministers, as shall be presented by the respective patrons, as the persons or ministers presented before the making of this act ought to have been admitted.

II. Provided always, That in case any patron or patrons have accepted of and received any sum or sums of money from the heritors or liferenters of any parish, or from the Magistrates or Town-Council of any borough, in satisfaction of their right of presentation, and have discharged or renounced the same under their hand, that nothing herein shall be construed to restore such patron or patrons to their right of presentation ; any thing in this present act to the contrary notwithstanding.

III. Provided also, and it is hereby enacted by the authority aforesaid, That in case the patron of any church aforesaid shall neglect or refuse to present any qualified minister to such church that shall be vacant the said first day of *May*, or shall happen to be vacant at any time thereafter, for the space of six months, after the said first day of *May*, or after such vacancy shall happen, that the right of presentation shall accrue and belong for that time to the presbytery of the bounds where such church is, who are to present a qualified person for that vacancy *tanquam jure devoluto*.

IV. And be it further enacted and declared by the authority aforesaid, That the patronage and right of presentations of ministers to all churches which belonged to Archbishops, Bishops, or other dignified persons, in the year one thousand six hundred eighty-nine, before Episcopacy was abolished, as well as those which formerly belonged to the Crown, shall and do of right belong to her Majesty, her heirs and successors, who may present qualified ministers to such church or churches, and dispose of the vacant stipends thereof for pious uses, in the same way and manner, as her Majesty, her heirs and successors, may do in the case of other patronages, belonging to the Crown.

V. Declaring always, That nothing in this present act contained, shall extend, or be construed to extend, to repeal and make void the aforesaid twenty-third act of the second session of the first parliament of the late King William and Queen Mary, excepting so far as relates to the calling and presenting of ministers, and to the disposing of vacant stipends, in prejudice of the patrons only.

VI. And be it farther enacted, by the authority aforesaid, That all and every patron and patrons, who have not taken, or shall not take, at any time before his or their presenting a minister or ministers to any church or churches aforesaid, the oath appointed to be taken by persons in publick trust, by an act made in the sixth year of her Majesty's reign, intituled, *An act for the better security of her Majesty's person and government*, shall, and are hereby obliged, at their signing such presentation, to take and subscribe the aforesaid oath before the Sheriff of the shire, Stewart of the stewartry, or before any two or more Justices of the Peace, of the county or place where such patron resides ; and in case such patron or patrons, who have not formerly taken the aforesaid oath, refuse or neglect to take the same at the signing of such presentation, that the same shall be and is hereby declared to be void, and the right of presentation, and of the disposing the vacant stipends for that time, shall belong to her Majesty, her heirs and successors, who may present a qualified person to such church or benefice, at any time within the space of six months after such neglect or refusal ; any thing in this present act, or in any other act, to the contrary notwithstanding.

VII. “ And whereas the right of patronage of churches may belong “ to Papists ;” Be it therefore enacted by the authority aforesaid, That any person or persons, known or suspected to be Papists, and who have a right of presenting ministers, shall be obliged, at or before his or their signing any presentation, to purge himself of Popery, by taking and signing the *formula* contained in the third act of the Parliament of *Scotland*, held in the year one thousand seven hundred, intituled, *Act for preventing the growth of Popery* ; and in case such Popish patron or patrons shall refuse to take and subscribe the *formula* aforesaid, the same being tendered to him or them by the Sheriff of the shire, Stewart of the stewartry, or any two or more Justices of the Peace within their respective jurisdiction, who are hereby empowered to administer the same, the presentation, and the right of disposing the vacant stipends shall, for that time, belong to her Majesty, her heirs and successors, who may present any qualified person or persons within six months after such neglect or refusal ; any thing in this present act, or any other act to the contrary notwithstanding.

No. 14.

EXCERPT from Act 5th Geo. I. cap. 29, intituled, “ An Act for making more effectual the Laws appointing the Oaths, for Security “ of the Government, to be taken by Ministers and Preachers in “ Churches and Meeting-houses in Scotland.”

VIII. “ And whereas great obstructions have been made to the “ planting, supplying, or filling up of vacant churches in Scotland, “ with ministers qualified according to law, patrons presenting persons to churches who are not qualified by taking the oaths appointed by law, or who, being settled in other churches, cannot or will “ not accept of such presentations.” To the end that such inconvenien-

cies may be prevented for the future, Be it enacted by the authority aforesaid, That if any patron shall present any person to a vacant church, from and after the said first day of June, one thousand seven hundred and nineteen, who shall not be qualified by taking and subscribing the said oath in manner aforesaid, or shall present a person to any vacancy who is then or shall be pastor or minister of any other church or parish, or any person who shall not accept or declare his willingness to accept of the presentation and charge to which he is presented, within the said time, such presentation shall not be accounted any interruption of the course of time allowed to the patron for presenting ; but the *jus devolutum* shall take place, as if no presentation had been offered ; any law or custom to the contrary notwithstanding.

IX. And be it also further declared and enacted, That nothing herein-contained shall prejudice or diminish the right of the church, as the same now stands by law established, as to the trying of the qualities of any person presented to any church or benefice.

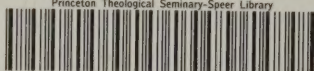
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